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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1934**

## No. 519

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

*vs.*

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

**PETITION FOR CERTIORARI FILED NOVEMBER 7, 1934.**

**CERTIORARI GRANTED DECEMBER 3, 1934.**

# SUPREME COURT OF THE UNITED STATES

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[fols. a-1] [Caption omitted]

In United States District Court, District of Massachusetts

Equity Docket. No. 3703

William A. S. Douglas et al., Plaintiffs,

v.

Elijah William Cunningham et al., Defendants

Bill of Complaint—Filed August 2, 1932

[Memorandum.—Copy of bill of complaint is here omitted as an amended bill of complaint was subsequently filed and allowed and will be found attached to the motion for leave to amend bill and printed on pages 6 to 11 of this transcript of record. James S. Allen, Clerk.]

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[fol. 2] In United States District Court

Answer of Post Publishing Company—Filed September 16, 1932

Now comes the Post Publishing Company summoned as defendant in the above-entitled cause and for answer says:

1. It admits that both defendants are inhabitants of the State of Massachusetts.

2. It is wholly ignorant of the allegations in paragraph No. 2 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

3. It is wholly ignorant of the allegations in paragraph No. 3 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

4. It is wholly ignorant of the allegations in paragraph No. 4 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

5. It is wholly ignorant of the allegations in paragraph No. 5 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

6. It is wholly ignorant of the allegations in paragraph No. 6 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

7. It is wholly ignorant of the allegations in paragraph No. 7 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

8. It is wholly ignorant of the allegations in paragraph No. 8 of the bill of complaint and leaves the plaintiff to make such proof thereof as he may be advised.

9. This defendant is wholly ignorant of the facts set forth in the ninth paragraph of the bill of complaint, but says that such facts are wholly scandalous, immaterial and irrelevant to the bill and moves as a part of its answer that the bill be dismissed as to paragraph No. 9.

10. This defendant admits that the article filed with the bill of complaint and referred to in said bill as "Exhibit C" was published by it in its Sunday edition of August 30, [fol. 3] 1931, but denies that the defendant Cunningham in any way infringed on any rights of the plaintiff or that he took the material in the story from the American Mercury, and says that said Cunningham obtained the facts in the article from a fellow newspaper man.

This defendant further says that the article was printed as a feature of the Sunday edition and this defendant has no intention of using said material again or in any other form, and hereby disclaims any intention to use said material on any other occasion or in any other form.

11. This defendant denies the fact set forth in paragraph No. 11 of the bill, but says that said paragraph is wholly scandalous, immaterial and irrelevant to the bill and moves as a part of its answer that the bill be dismissed as to paragraph No. 11.

By its Attorneys, Elder, Whitman, Weyburn & Crocker.

IN UNITED STATES DISTRICT COURT

ANSWER OF ELIJAH WILLIAM CUNNINGHAM—Filed September 16, 1932

Now comes this defendant and for answer says:

[MEMO.—Other parts of this answer identical with that of the Post Publishing Company are not here printed.]

* * * * * * *

10. This defendant admits that he prepared and gave to the defendant Post Publishing Company to be printed in its newspaper the article purporting to come from the newspaper Boston Sunday Post filed with the bill, but he denies that he had any knowledge of the article claimed to be written by the plaintiff either as published in the American Mercury or elsewhere, but says that while he was employed in the State of Oklahoma the facts set forth in the story were given to him by another newspaper man and he wrote the same in good faith, believing the statements therein contained were true.

* * * * * * *

By his Attorneys, Elder, Whitman, Weyburn & Crocker.

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[fol. 4] IN UNITED STATES DISTRICT COURT

DEFENDANTS' MOTION TO DISMISS—Filed April 4, 1933

Now come both defendants and move that the bill be dismissed for the following reasons:

1. Because the bill shows upon its face that no copyright was ever obtained by the American Mercury.

2. Because it appears on the face of the bill that the plaintiff has no standing in this court.

These defendants further renew their motions embodied in their respective answers that paragraphs No. 9 and No. 11 of said bill be dismissed for the reasons set forth in paragraphs No. 9 and No. 11 of the answers.

By their Attorneys, Elder, Whitman, Weyburn & Crocker. Edmund A. Whitman, of Counsel.

At the same term, to wit, April 10, 1933, said cause came on to be heard on the aforementioned motion to dismiss, the Honorable James A. Lowell, District Judge, sitting, and on the fourteenth day of said April a memorandum of the court was announced, granting motion to dismiss.

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[fol. 5] IN UNITED STATES DISTRICT COURT

DEFENDANT'S MOTION THAT FULL COSTS AND COUNSEL FEE BE ALLOWED—Filed April 17, 1933

Now come the respondents and, after the granting of the motion to dismiss the bill, move the court that full costs and counsel fee be allowed to each respondent in accordance with Section 40 of the Copyright Act.

By their Attorneys, Elder, Whitman, Weyburn & Crocker.

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IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION FOR LEAVE TO AMEND BILL—Filed April 18, 1933

Now comes William A. S. Douglas, plaintiff in the above-entitled case, and moves this court for leave to file an amended bill of complaint, amended by adding The American Mercury, Inc. as a party plaintiff, and in other respects, and requiring no further answer from the said defendant, a copy of said amended bill being attached hereto.

The original bill has been amended as follows:

1. By adding The American Mercury, Inc. as a party plaintiff and in the title of this case.

2. By changing the word "plaintiff" to "plaintiffs" throughout, and specifying the plaintiff W. A. S. Douglas and the plaintiff The American Mercury, Inc., where necessary, as appears in said amended bill.

3. The words on page 4 [printed page 8], line 2, paragraph 6, "annexed hereto as Exhibit A" are omitted and

there is substituted therefor "ready to be produced in court if required."

4. The words on page 6 [printed page 10,] line 6 of paragraph 11, "not only permanently but temporarily [fol. 6] pending this suit" are omitted.

5. The words on page 6 [printed page 10], paragraph 2, lines 1 and 2 of the prayer for relief, "an injunction issue preliminary until final hearing therein and perpetual thereafter" are omitted, and there is substituted therefor "a perpetual injunction issued" as appeared on page 6 [printed page 10] of the amended bill.

By his Attorneys, MacLeod, Calver, Copeland & Dike. George P. Dike, Cedric W. Porter, of Counsel.

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IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

The plaintiff, William A. S. Douglas, a citizen of the United States and residing at 1413 Tower Road, City of Winnetka, County of Cook, State of Illinois, and the plaintiff The American Mercury, Inc., a corporation duly organized and existing under the laws of the State of New York and having a principal place of business at 730 Fifth Avenue, City, County and State of New York, present this their bill of complaint against the defendant, Elijah William Cunningham, residing at 42 Sheffield Road, City of Newton, County of Middlesex, and State of Massachusetts, and against the defendant Post Publishing Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and having a regular and established place of business at 259 Washington Street, Boston, County of Suffolk, and State of Massachusetts.

And thereupon the plaintiffs complain and say:

(1) This is a suit in equity arising under the copyright laws of the United States. The defendant Elijah William Cunningham is an inhabitant of the State of Massachusetts and the defendant Post Publishing Company is a corpora-

tion organized and existing under the laws of the State of [fol. 7] Massachusetts and has a regular and established place of business within the District of Massachusetts, and upon these facts the court's jurisdiction depends.

(2) That heretofore and prior to February 25, 1928, the plaintiff W. A. S. Douglas, a citizen of the United States, and by profession a newspaperman and author, wrote and composed a certain original literary work in the form of a short story based on fictional incidents and entitled "Klu Klux"; and that during the times hereinafter mentioned the plaintiff The American Mercury, Inc., was and now is a corporation organized under the laws of the State of New York, and during the year 1928 was engaged in the publishing business in the City of New York, County and State of New York, and was the proprietor and publisher of a certain periodical published each month at said City of New York entitled and known as The American Mercury, which said periodical was composed of stories, novels, poems, essays, criticisms and other literary compositions, and the periodical numbers of the same were, as plaintiffs are informed and believe, duly entered for and protected by copyright under the laws of the United States.

(3) That heretofore and prior to February 25, 1928, the said William A. S. Douglas did, for a valuable consideration to him then paid by the said The American Mercury, Inc., sell and assign to said The American Mercury, Inc. the said story entitled "Klu Klux".

(4) That said literary work of the plaintiff W. A. S. Douglas was thereafter published in print on or about the twenty-fifth day of February, 1928 under the title of "Klu Klux" in and as part of Volume XIII, No. 51, of The American Mercury for March, 1928, by the said The American Mercury, Inc. at the said City of New York; that when so published said work had affixed to its title page notice of copyright in words and figures as follows, to wit: "Copyright, 1928, by The American Mercury, Inc."; and as plaintiffs are informed and believe that said notice has been affixed to the title page of each and every volume sold, published and/or publicly distributed by and under the authority of the plaintiff The American Mercury, Inc.

[fol. 8] (5) That the said number of the American Mercury for March, 1928, was a volume of about 383 pages and

consisted of the plaintiff W. A. S. Douglas' said literary work entitled "Klu Klux", therein, published on pages 272 to 279 inclusive, and other literary compositions.

(6) And the plaintiffs further say, on information and belief, that said The American Mercury, Inc. on the twenty-third day of February, 1928 and immediately before the first publication thereof, as aforesaid, deposited or caused to be deposited in the mail, addressed to the Register of Copyrights, Washington, D. C., two complete copies of the best edition of said work then published, together with a written claim of copyright therein, and an affidavit showing that said work was printed in the United States, from type set within the limits of the United States, that the same was bound within the United States, and that the making of the plates and engraving, photo-engraving, text and everything embodied in said publication were all performed within the limits of the United States, and has paid the fees prescribed by law; that the said Register of Copyrights duly issued to The American Mercury, Inc., under the seal of the Library of Congress, Copyright Office of the United States of America, a certificate of copyright registration signed by the Register of Copyrights, dated and identified as follows: "February 23, 1928, Class B, XXc No. 767,826", a certification of which registration is ready to be produced in court if required.

(7) That by reason of the premises, the said The American Mercury, Inc. acquired the sole liberty and exclusive right of printing, reprinting, publishing, copying, vending, dramatizing and translating in whole and in part the said No. 51, Vol. XIII, of The American Mercury for March, 1928, consisting in part of said literary work of the plaintiff W. A. S. Douglas entitled "Klu Klux", for a term of twenty-eight years from the twenty-fifth day of February, 1928.

(8) The plaintiffs further say that on or about the ninth day of March, 1928, by a certain instrument in writing, the said The American Mercury, Inc. assigned, set over, trans-[fol. 9] ferred and conveyed to the plaintiff W. A. S. Douglas for a good and sufficient consideration the copyrights registered in the office of the Register of Copyrights in the United States of America to and in the literary work written by the plaintiff W. A. S. Douglas entitled "Klu Klux", the original of which written assignment is ready to be pro-

duced in court if required; that the plaintiff W. A. S. Douglas herein now is the sole owner and proprietor of the said literary work entitled "Klu Klux" and of the copyright thereof and of all rights therein and therefrom arising.

(9) That thereafter the plaintiff W. A. S. Douglas caused the said literary work "Klu Klux" to be reproduced in the form of a dramatic composition, which now awaits production upon the stage, and has been offered large sums for the motion picture photoplay rights in and to the said literary work, and has been offered publication of said literary work in a book of short stories when sufficient other short stories shall have been written by the plaintiff W. A. S. Douglas and that the copyrights in said literary work are extremely valuable to the plaintiff W. A. S. Douglas.

10. The plaintiffs further say that subsequent to the twenty-fifth day of February, 1928, and before the commencement of this action, that the defendant Elijah William Cunningham, well knowing the premises and the rights and privileges of the plaintiff W. A. S. Douglas and contriving to injure him and deprive him of the business and profits which would otherwise have accrued from the ownership of said copyrights and exclusive rights and privileges therein, and without the consent and against the will of the plaintiff W. A. S. Douglas, and in infringement of the said copyright and in violation of the rights of the plaintiff W. A. S. Douglas in his said original literary work entitled "Klu Klux", prepared and caused to be printed a short story which contains the entire plot and the dramatic situations arranged in the same order and sequence, all of the characters and nearly all of the incidents and ideas invented, devised, composed and written by the plaintiff W. A. S. Douglas in his said original literary work or short story entitled "Klu Klux"; that the said short story copied and recomposed and arranged by the said defendant [fol. 10] Elijah William Cunningham was published and featured as if it were a news article by the defendant Post Publishing Company, in its issue of the Boston Sunday Post of August 30, 1931, under the heading "Klan Killed Hero of War", with the words "By Bill Cunningham" thereunder, on page 1 and continued to page 5 of said issue, a copy of which is annexed hereto and made a part hereof as Exhibit C.

(11) That but for the wrongful acts and conduct of the defendants herein complained of plaintiff W. A. S. Douglas would now be in exclusive enjoyment of his aforesaid rights to reproduce and exhibit said copyrighted work and would have enjoyed large business and profits therefrom but by reason of such unlawful acts and conduct of defendants, plaintiff W. A. S. Douglas has been prevented and hindered from enjoying such business and profits and is threatened with great and irreparable damage unless the infringing and unlawful acts complained of shall be restrained, enjoined and prevented by an order from the court to that effect.

(12) For as much as the plaintiff can not have adequate and complete relief except in a court of equity and in this court, plaintiffs pray:

1. That there be issued out of and under the seal of this court a subpœna ad respondendum directed to said defendants commanding them on a day certain to appear and make answer to the bill of complaint, and to abide and conform to such court order and decree which hereinafter may be made.

2. That a perpetual injunction issue enjoining and restraining the said defendants, Elijah William Cunningham and Post Publishing Company, and each of their officers, clerks, attorneys, agents, servants and employees and all other persons acting under their authority or direction, jointly or severally, and each and every one of them and all in privy with them from directly or indirectly printing, selling or using in printed publications, or otherwise disposing of any copies of said publications or parts thereof and from further publishing or selling or exposing for sale or using in printed form any printed matter which shall infringe in any respect said copyrighted work of the plain-
[fol. 11] tiffs and from using, reproducing, imitating, copying or simulating in any way whatsoever any of the original matter contained in the said copyrighted work written and owned by the plaintiffs.

3. That the defendants shall make full, true, direct and personal answer, but not under oath, an answer under oath being hereby specifically waived, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and charged as

fully and particularly as if the same were here repeated paragraph by paragraph and defendants specially interrogated thereto.

4. That the said defendants be compelled by an order of this Honorable Court to account for all such infringing reproduction of said literary work of the plaintiffs in whatsoever form possessed by the defendants or at any time in their possession and to account for and pay over to the plaintiffs all such gains and profits as plaintiff would have received but for such wrongful acts and conduct of the said defendants and all damages plaintiffs have sustained thereby, or, in lieu of actual damages or profits, such damages as to this court shall appear to be just and proper within the provisions of the act of Congress in such cases made and provided.

5. That the defendants pay to the plaintiffs all reasonable costs and charges of this suit, as well as a reasonable counsel fee, and that the plaintiffs may have such other and further relief as to the court may seem meet herein and conformable to the course and principles of equity.

William A. S. Douglas and The American Mercury Inc., by their Attorneys, Macleod, Calver, Copeland & Dike. Of Counsel: George P. Dike, Cedric W. Porter.

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[Memorandum.—Copy of Exhibit C, a story published in the Boston Sunday Post, and referred to as annexed, is here omitted. James S. Allen, Clerk.]

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[fol. 12] Also at the same term, to wit, April 18, 1933, said cause was set down for hearing on the motion that full costs and counsel fee be allowed, etc. and on plaintiff's motion for leave to file amended bill of complaint, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence continued under advisement to May 16, 1933, when a memorandum of court was announced allowing plaintiff's motion to amend bill of complaint and denying defendant's motion for costs.

This cause was thence continued from term to term to the September Term, A. D. 1933, when, to wit, November

10, 1933, said cause was set down for hearing on the pleadings and evidence, the Honorable James A. Lowell, District Judge, sitting.

This cause was thence continued under advisement to the present December Term, A. D. 1933, when, to wit, December 14, 1933, a memorandum of the court is announced, a decree to be entered in favor of the plaintiff.

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IN UNITED STATES DISTRICT COURT

FINAL DECREE—January 2, 1934

This cause having come on to be heard upon pleadings and after trial in open court and having considered the arguments and briefs of Cedric W. Porter, Esquire, for the plaintiffs and Edmund A. Whitman, Esquire, for the defendants, it is

Ordered, adjudged and decreed:

1. That William A. S. Douglas is the author of a certain short story entitled "Klu Klux," that copyright of said story was duly obtained by publication of said story with the statutory notice of copyright and the filing of two copies of said story in the Library of Congress, for which a certificate of copyright registration was duly issued dated February 23, 1928, Class B, XXc, No. 767,828; that said copyright is good and valid in law and is owned by the plaintiffs.

2. That the defendants, Elijah William Cunningham and [fol. 13] Post Publishing Company, have infringed and violated the said copyright and the exclusive rights of said plaintiffs.

3. That a writ of injunction be issued out of and under the seal of this court perpetually restraining and enjoining the said defendants, Elijah William Cunningham and Post Publishing Company, and each of their officers, clerks, attorneys, agents, servants and employees and all other persons acting under their authority or direction, jointly or severally, and each and every one of them and all in privy with them from directly or indirectly printing, selling or using in printed publications, or otherwise disposing of any copies of said publications or parts thereof and from fur-

ther publishing or selling or exposing for sale or using in printed form any printed matter which shall infringe in any respect said copyrighted work of the plaintiffs and from using, reproducing, imitating, copying or simulating in any way whatsoever any of the original matter contained in the said copyrighted work Klu Klux written and owned by the plaintiffs.

4. That the plaintiffs recover of the defendants, Elijah William Cunningham and Post Publishing Company, in lieu of actual damages or profits, the sum of five thousand dollars ($5,000), and in addition a reasonable attorney's fee of fifteen hundred dollars ($1,500).

Elisha H. Brewster, United States District Judge.

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### Claim of Appeal and Allowance Thereof

From the foregoing final decree, the defendants claimed an *au* appeal to the United States Circuit Court of Appeals for the First Circuit on the ninth day of January, A. D. 1934, which appeal was allowed by the court on January 10, 1934.

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### In United States District Court

### Memorandum on Motion to Dismiss—April 14, 1933

Lowell, J.:

The complainant brought a bill in equity for infringement of a copyright, in which he alleged that he had composed a short story, Klu Klux, which he had sold to the American Mercury Magazine. This was published by the [fol. 14] American Mercury Magazine, together with many other stories and articles, in its issues of March 1928, which was sent out on February 25, 1928. The American Mercury Magazine took out the copyright by depositing this issue in Washington on February 23, 1928. The bill further alleged that in March, 1928, the American Mercury Magazine assigned in writing to the complainant all its rights to the short story Klu Klux.

The respondents filed a motion to dismiss. It gave several reasons for this motion, one of which was that it ap-

peared from the bill of complaint that the complainant was not the owner of the copyright as the entire copyright in the issue of March, 1928, was not assigned to him, but that he had merely been given the rights in one part of it which related to the story Klu Klux. This at most constituted him a licensee. In my opinion the point is well taken. New Fiction Publishing Co. v. Star Company, 220 F. 994.

In the case of Witwer v. Harold Lloyd Corporation, 46 F. (2d) 792, cited by the complainant, it is not clear from the report whether the story was copyrighted alone or as part of an issue of the Popular Magazine. But it appears that the whole copyright (whichever it was) was assigned to the plaintiff. That case therefore is distinguishable from the present one.

Motion granted.

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IN UNITED STATES DISTRICT COURT

MEMORANDUM—December 14, 1933

BREWSTER, J.:

This cause was before the late Judge Lowell for hearing upon the merits. It is a copyright suit where the infringement of a copyrighted article in the American Mercury is admitted. The only question presented related to the amount of damages and the attorney's fees. After hearing testimony and arguments of counsel, the following statement was made by the court:

"Mr. Clerk, you may make the entry, '$5,000 plus $1,500 attorney's fee, to be suspended on the question of law to be argued later by the parties.' "

The court added that the Post Publishing Company had published the article as news in an issue which had gone to [fol. 15] over 300,000 subscribers or buyers and that it was perfectly clear to him that the infringement was more than the statutory sum of $5,000.

Before the briefs had been filed, or at least considered by Judge Lowell, his death occurred, and the parties have agreed that the case may be now disposed of upon the record and the briefs filed by the parties.

As I read the record, Judge Lowell determined the amount of the damages and the amount of the reasonable

attorney's fee which the plaintiff is entitled to recover. This determination must stand unless it must be held that the award was unauthorized by 17 U. S. C. A. 25 and 40, the statute under which the suit was instituted. I do not deem it to be within my province to decide whether there has been an abuse of the discretion which the act gives to the court respecting a just award of damages or reasonable attorney's fee, and clearly I cannot pass judgment upon the justice of an award made by another judge of this court. Any party aggrieved by Judge Lowell's action has his remedy by appeal.

I am satisfied that the statute authorized the entry of an order for the decree of $5,000 damages and $1,500 attorney's fee. The applicable provisions of Section 25 are as follows:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . 'To pay to the copyright proprietor . . . in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but . . . such damages shall in no . . . case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . .

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"

Plaintiff's work came within those enumerated in Section 5.

Obviously Judge Lowell adopted the alternative in fixing [fol. 16] damages, as was clearly his right if he thought the facts warranted, of allowing the plaintiff to recover $1 for every infringing copy sold by the defendant publishing company, and inasmuch as the total number of these copies exceeded 300,000 the maximum limitation necessarily was applied.

I find nothing in the defendant's brief or in the cases cited to support the proposition that the copyright laws are inadequate to sustain the award. It is not enough in the

situation presented by the record to show how other courts have applied the statute or exercised the discretionary power conferred by it.

I do not find that the courts have ever interpreted the statute to mean that where no actual damages were proved the court, in awarding an amount in lieu of actual damages, is limited to the minimum of $250, but if the court is to be thus limited the record reveals a finding of actual damage by Judge Lowell.

I cannot rule as a matter of law that the conclusions reached by Judge Lowell are erroneous, and a decree may be entered in favor of the plaintiff for $5,000 damages and $1,500 attorney's fee.

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IN UNITED STATES DISTRICT COURT

DEFENDANT'S PRÆCIPE AND ANNEXED SUMMARY OF EVIDENCE FOR RECORD ON APPEAL—Filed February 14, 1934; approved February 15, 1934

To the Clerk of the above-named Court:

SIR: Please prepare a transcript of the record, pleadings, proceedings and papers in the above entitled cause to be transmitted to the United States Circuit Court of Appeals for the First Circuit in the matter of the appeal heretofore allowed and include in such transcript copies of the following papers and proceedings, to wit:

1. Bill of complaint by reference.
2. Answer of Post Publishing Company.
3. Paragraph No. 10 from Answer of Elijah William Cunningham, noting that the rest of the answer is identical with that of the Post Publishing Company.
4. Motion to dismiss.
5. Order of court thereon.
6. Memorandum by the court.

[fol. 17] 7. Defendants' motion for costs.

8. Order of court thereon.
9. Motion for leave to amend the bill with amended bill, but without exhibits.
10. Order of court thereon.
11. Transcript of the record of the proceedings and testimony of the witnesses before the court stated in simple and condensed form, omitting all parts not essential to the

decision of the questions presented by this appeal and as allowed by trial judge. See summary appended hereto.

12. Opinion of Brewster, J.
13. Final decree.
14. Assignment of errors.

Elder, Whitman, Weyburn & Crocker, Edmund A. Whitman, for Defendants.

February 15, 1934. Approved.

Elisha H. Brewster, United States District Judge.

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In United States District Court

**Summary of Proceedings and Evidence**

At the hearing before the court November 10th the defendants admitted the validity of the copyright and its infringement. Counsel for the defendants called to the attention of the court the motions to dismiss in paragraphs No. 9 and No. 11 of the answers, whereupon the court said:

"Well, I will leave it in, Mr. Whitman, but I do not think you can possibly show any damage under it. Your motion is denied."

Whereupon counsel for the defendant said: "I would like to save my rights."

The plaintiff testified to his occupation as a newspaper editor and magazine writer and his experience as such; that the American Mercury gave him permission to join it as a party plaintiff; that he had written short stories and [fol. 18] had somewhere around ninety or one hundred published in well-known magazines; that during the three years that he was in the motion picture business he wrote almost thirty moving picture scenarios, and one of his stories was made into a picture; that he had also conducted columns in his own name in several metropolitan newspapers; that he had an assignment from the American Mercury of the article in question dated March 9, 1928; that the article was fiction and the infringing article was written as a news feature story happening in a period of time, but gathered by the writer through interviews; that one Harry Aitken had offered him fifteen hundred dollars a few months after the story had appeared for the motion pic-

ture rights—rights to produce it at any time he saw fit. The offer was not accepted. That he had had the story adapted for presentation upon the stage in November or December of 1928; that he paid four hundred and fifty dollars to have the adaptation done; that he had been offered publication of his story in a book of short stories by Alfred Knopf & Co., publishers, of 750 Fifth Avenue, a very short time after the story came out.

On cross-examination the witness testified he was with one motion picture concern from November, 1912, to September, 1914, as editor of a "Screen Weekly" and as production manager between 1914 and 1915, and with another picture concern in 1919 to January, 1921: that he had served with the British Army and the American Army.

In response to questions by the court witness stated that the story had never been put upon the stage. It would have been but for the depression. A Mr. Woods had an option upon it and held it for six months, then he went broke and could not do it. That it why the witness spent the money for having it adapted on the promise that Woods would produce it; that it had never been adapted for the movies because he had refused the offer of Mr. Aitken because he had been told at the time that if he put it on as a stage play he could get many times as much as was offered.

In response to a question by the court counsel for the plaintiff admitted that the defendant corporation acted innocently.

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[fol. 19] The defendants called Edward J. Dunn, who testified he was city editor of the defendant corporation, was familiar with the story and that it had not been reproduced since it was first printed and there was no intention by the corporation to reproduce it; that it appeared in the Sunday edition comprising seventy pages, which included many other feature stories; that this edition was of the general makeup of Sunday papers of the Post.

In answer to questions by the court the witness stated that this was the only feature story which appeared on the front page; that they usually started three.

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The defendant Cunningham testified that he was connected with the Post and read the story in question; that he

got the story in Dallas, Texas, sometime after the publication in the Mercury; that while there he visited a newspaper office where he had formerly been employed and there met a reporter formely associated with him in that office, who told him the main features of the story. The witness told him that if he would write out the story so that he could use it, he (the witness) would pay him twenty-five dollars; that later the story was so written out and the money paid.

On cross-examination the witness testified that this reporter's name was Abie Martin, who told him the incident happened in Oklahoma somewhere and it was something of which he knew; that later in Oklahoma City a woman and another were shown to the witness as the victims, but later he found he had been hoaxed. He did not remember her name, he made no effort to corroborate the story and never saw the tombstone described therein; that he could not produce any newspaper clippings giving features of the story, but could produce clippings showing a similar thing in Centralia, Washington; that he did not personally have such, but they could be found in newspaper files where an American Legion parade was shot into; that the defendant Post did not check up the truth and accuracy of his story; that he had been in the newspaper business since 1919.

In answer to a question by the court he said he had not seen the story in the Mercury.

[fol. 20] It was then agreed between counsel that of the Boston Sunday Post issue in question there were 384,834 copies on the following Sunday 380,277 copies and on the following 379,316, August 30, September 6 and 13, 1931.

During the argument for the plaintiff the court inquired whether counsel claimed there were any damages here, that he had shown any damages, to which counsel replied:

"I do not think we show any damages, your Honor, and we invoke the specific sections of the statute which provide for $1 for each infringing copy, and the amount of damages to be awarded by the Court."

In answer to the inquiry by the court what was a reasonable fee, counsel stated:

"I can candidly state, your Honor, that the time that has been spent upon this case exceeds 100 hours, and that

the ordinary compensation given, if it were charged on a purely time basis, would be in excess of $1,000. I do not say that we would charge in excess of $1,000. I do not say that the plaintiff would necessarily be charged that because, of course, as your Honor knows, we have to gauge fees by the ability of the plaintiff to pay, and other circumstances,"

that the 100 hours included services before having the first bill dismissed and as attorney's fee

"We suggest the sum of one—"

the reporter failing to catch the balance of the sentence.

At the conclusion of the arguments the court inquired of counsel for the respondents:

"You wish to suspend on the question of law?
"Mr. Whitman: I would, your Honor,"

whereupon the court said:

"Mr. Clerk, you may make the entry, '$5,000 plus $1,500 attorney's fee, to be suspended on the question of law to be argued later by the parties'.

[fol. 21] "Here your Post puts in as a matter of news something which it ought to know was not news, puts it on the front page of a paper which has 300,000 subscribers or buyers, and the plaintiff has shown that he refused $1,500. It is perfectly clear to me that the infringement was more than the statutory sum of $5,000. Therefore, I order the $5,000 and a $1,500 attorney's fee, plus costs, subject to the argument whether as a matter of law I have the right to award that full amount, or whether it must be shaded down or entirely cut down or entirely refused."

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### In United States District Court

### Assignment of Errors—Filed January 9, 1934

Now come the defendants, Elijah William Cunningham and the Post Publishing Company and in support of their

appeal assert that this court erred in the following respects, to wit:

That the court erred:

1. In entering the decree;

2. In not allowing the motion to dismiss in paragraphs 9 and 11 of the defendants' answers;

3. In allowing the motion of the plaintiff to amend the bill;

4. In assessing damages in the sum of five thousand dollars;

5. That the court abused its discretion in entering the decree for damages in the sum of five thousand dollars;

6. In awarding the sum of fifteen hundred dollars as counsel fee;

7. That the court abused its discretion in awarding the sum of fifteen hundred dollars as counsel fee.

By their Attorney, Edmund A. Whitman.

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RECITAL AS TO BOND ON APPEAL

Also on the ninth day of said January a bond on appeal for damages and costs in the sum of seven thousand dollars ($7,000) was filed by the defendants, the American Employer's Insurance Company acting as surety, and said bond was approved by the court on the tenth day of January, A. D. 1934.

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[fol. 22] RECITAL AS TO CITATION AND SERVICE

A citation on appeal was issued on January 10, 1934, being made returnable in the United States Circuit Court of Appeals on February 9, 1934. Service of said citation was duly acknowledged by the attorney for the plaintiffs.

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Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] In United States Circuit Court of Appeals for the First Circuit, October Term, 1933

No. 2903

Elijah William Cunningham and Post Publishing Company, Defendants-Appellants,

v.

William A. S. Douglas and The American Mercury, Inc., Plaintiffs-Appellees

**Addendum to Transcript of Record of District Court Containing Narrative Testimony in Full of the Plaintiff W. A. S. Douglas and Defendant E. W. Cunningham—** Filed April 9, 1934

Printed by Appellees

[fol. 24] Mr. William Archer Sholto Douglas, called as a witness on behalf of plaintiffs and being duly sworn, testified as follows:

Direct examination.

By Mr. Porter:

I am William Archer Sholto Douglas; forty eight years of age; and live in New York City. I am a newspaper editor and magazine writer. I am editor of the advance news sections of the Hearst's Sunday newspapers.

I am the W. A. S. Douglas who is one of the plaintiffs in this action.

The American Mercury gave me its permission to join it as a party plaintiff in the amended bill of complaint.

As to my previous experience—I have been a newspaper man since 1928, with the exception of some war service and two and one-half years in the motion picture business. During that time I have been on the staff of the Philadelphia North American, now defunct.

That is the first paper I worked on. I was night city editor of the New York Journal, I was reporter on the New York Herald, I was make-up editor of the Dallas News, I was managing editor of the Houston Post, I was

special correspondent with the Treaty of Versailles, I was at the Geneva conference of the Locarno Pact. I have been in Chicago for the last several years, about six years, as news representative there of the Baltimore Sun, the New York Herald Tribune, and the Boston Herald, the Literary Digest, and the London Daily Mail. I gave up those positions six weeks ago to enter the service of Mr. Hearst under a lengthy contract.

I have written a number of short stories and I have had probably something around 90 or 100 published. The stories have been published in America, in the American Mercury, Plain Talk, Book Man, Collier's, The Nation, the New Republic, Freeman, the New York Times Magazine, the New York Herald Tribune Magazine; and in England, in Britannia and Eve, which is the leading magazine there; and in Liberte and Parisien in Paris.

[fol. 25] The Court: I will say, Mr. Douglas, off the record now, or on the record if you want it, that I consider your story, the "Klu Klux," extremely well done. I was very much interested in reading it.

The Witness: Thank you, your Honor.

The Court: I am glad this case arose, so that my attention could be called to it.

The Witness: Thank you very much, sir.

The Witness: I have written motion picture scenarios. I was almost three years in the motion picture business as editor of the Pathe News and as production manager of the Pathe Company and of the Triangle Film Corporation. During that period of time, I wrote, I would imagine, almost 30 motion picture scenarios, the chief of which was "The Perils of Pauline" and "The Exploits of Elaine," with Pearl White; "The Rose of the Rancho" and "The Rose of the Border" with Betty Compson; and one of my Mercury stories, "Sandwiches and Sex Appeal," was bought by Colleen Moore and made into a picture.

I have written and conducted columns in several newspapers under my own name. In Chicago and in London as correspondent of the Sun I carried a column in London called "From a Fleet Street Window"; and in Chicago it was "The Chicago Parade." I also carried a column for a while about a year ago, just before the election, which was carried in the Boston Herald, which I worked for there, and also in the Sun and also in the Herald Tribune,

but I dropped that after three months because I had to travel around with Mr. Roosevelt, and I had not time to get it out in Chicago as I should have done, but Mr. Choate was very anxious that I should continue it (Mr. Choate is the managing editor of the Boston Herald), and also Mr. Wilcox of the Herald Tribune.

The Witness: My story "K-u Klux" was not based upon actual incidents, but is fictional. The only fact in the story is the fact that I was an oil well digger. I, the author—I wrote in the first person—was an oil well digger at the time that these incidents are supposed to have happened. [fol. 26] That is the only portion of the story that was left out of the Cunningham version. The Cunningham story as published in the Post is written as a news feature story, human interest story, without a spot news date line, as happening in a period of time but gathered by personal observation by Mr. Cunningham through interviews with these persons with whom he discussed the matter, presumably in Oklahoma City and these places like Old Man Trafton's and other imaginary places.

Mr. Harry Aitken offered me $1,500, a few months after the story had appeared, for the motion picture rights to it—the right to produce it at any time he saw fit. You have the letter there.

Mr. Aitken's offer was not accepted.

My story "K-u Klux" has been adapted for presentation upon the stage. The adaptation was made, I believe, in November or December of 1928. I paid $450 to have the adaptation done.

I have been offered publication of my story "K-u Klux" in a book of short stories by Alfred Knopf & Company, the publishers, of 750 Fifth Avenue. That was a very short time after that story came out, your Honor.

Cross-examination.

By Mr. Whitman:

In addition to the Pathe concerns that I was connected with, I was with the Triangle Motion Picture Company. I was with the Pathe Company from November, 1912, I think till September, 1914—in August, 1914 I was the editor of the Pathe News, that screen weekly. I was the production manager between 1913 and 1914. And then

I was with the Triangle Company from 1919 to the beginning of 1921; I think it was January, 1921.

X Q. 1. So that from 1913 to 1921 you were out of the literary newspaper business except so far as you were editor of a moving picture——

A. I was in the British Army from 1914 to 1915, and the American Army in 1918. I saw service with the British Army at the beginning of the War in 1914, August, [fol. 27] 1914, in France. I have also seen service in Africa and in Egypt and in India and in Hongkong. I was in the British Army from 1901 to 1907. I went in the British Army in 1901 as a drummer boy. I did not see military service in Mexico. I was a motion picture cameraman in Mexico.

X Q. 2. Yes. Don't you hold some sort of commission from the——

A. Oh, that is a silly thing. I think that President Obregon made me a major, an honorary major in the Mexican Army. In the late War I saw service in France, sir.

X Q. 3. And were you present in the capture of Port au Prince in Haiti?

A. I was in Port au Prince as a kid when I first came over to this country.

X Q. 4. And on the staff of General somebody or other?

A. That was a negro general. I was only there about three or four weeks. I met a man in London who suggested that I was—happened to serve in the British Army; I just got out of it at that time, and I planned to come to this country.

The Court: I am very glad to hear this, Mr. Whitman.

Mr. Porter: It is all very interesting, your Honor. Otherwise I would object.

The Court: I do not know whether it makes the plaintiff's case any better.

Mr. Whitman: Well, I was trying to bring out by that his wide experience and his ability to get extraordinary stories.

The Court: Very likely, but I do not know what it has to do with it. Shakespeare was not apparently a man of very wide experience when he first came to London; afterwards I suppose he gained some, but "The Merchant of Venice" would not have been any better or any worse if you could prove that Shakespeare had ever been in Venice. He never was, of course.

Mr. Whitman: My only purpose is to show his wide experiences all over the world where he might have picked up extraordinary stories, and this seems to be the one he picks upon as being his masterpiece.

[fol. 28] The Court: Has this story, this "K-u Klux," been put on the stage?

The Witness: No, sir. It would have been put on the stage but for the depression. Mr. Woods had an option on it; Al Woods held it for six months; then he went broke and couldn't do it. He promised that he would put it on. That is why I spent the money having it adapted, on Mr. Woods' promise that he would produce it.

The Court: Has it ever been adapted for the movies?

The Witness: No, sir, because I refused the motion picture offer of Mr. Aitken because Mr. Halperin and Mr. Woods told me at that time, if I put it on as a stage play, instead of getting $1,500 from Mr. Aitken, I could get many times that much. Mr. Halperin is the general manager of Variety.

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Mr. Elijah William Cunningham, called as a witness on behalf of defendants, and being duly sworn, testified as follows:

Direct examination.

By Mr. Whitman:

I am Elijah William Cunningham, and I am connected with the Boston Post. I wrote the story that appeared in the Post which is in question.

Well, I got the story in Dallas, Texas, I cannot be sure of the exact date, but some time after its publication in the Mercury. I was accustomed to going back to Dallas to visit my mother, who lived there and still lives there, and I once worked on the Dallas Morning News, and I used to go over to this particular office. Upon these trips I was supposed to get feature stories for the Post if and when possible, and this particular time I was in there looking back over the files of the K-u Klux Klan troubles and whippings and whatnot that I had covered down there when I was a reporter right after the War; and while I was looking over these files on this particular night, in came a man who had

worked on the News with me when we were both youngsters breaking in, who had drifted away and had become a sort [fol. 29] of itinerant newspaper man, a press agent for a circus and sundry other jobs—had gone completely to the bad, but was an old friend and a valued one; and he came in this particular night when I was looking through the files, and asked me what I was doing, and I told him.

He said, "If you are looking up the Klan stuff," he said, "there was a case up in Oklahoma of the Klan's taking a woman out and whipping her." And he went into great detail about the thing—apparently it was very vivid in his own mind—and he said it had been extensively written up, and he suggested that if I looked back through the files sufficiently, I might be able to find it. Well, I looked hard the next day and could not find anything about it, and the next night he came in again and asked me if I had found it, and I told him no, and he wanted to know—and I wanted to know—I asked him how well he knew the story himself, and he thought he could get ahold of it, and the thing was very hit and miss. I did not go into any great amount of detail. I did not know what the story was or care very much about it, but I wanted to do something for him if I possibly could, and I told him if he could get the story in such shape that I could use it, I would pay him $25, and I was thinking more of giving him the twenty-five than of getting the story at the time.

Well, he said he would try. He had a visit to make to his mother or something, and he would be back in about a week, and asked me if that would be time enough, and I said yes. So he finally came back a week or so later and gave me this story written out in eight or ten pages or what we call copy paper, and I gave him the money without asking him anything more about it, stuck the story in my grip, and on the way home I opened it and read it, and I was very greatly impressed with the drama of it.

Cross-examination.

By Mr. Porter:

The name of this newspaper man from whom I say I got this story was Martin. We called him Abie Martin. I do not know what his first name was; I do not think that was it. Mr. Martin did not tell me in what city in Oklahoma

[fol. 30] that story was supposed to have occurred. He merely said, "Up in Oklahoma somewhere." He had just come back from Oklahoma with his circus, as I understood it, and he had been touring up through there. He told it as something of which he knew.

X Q. 1. I understood you to say, from the correspondence—you can say it it not true if you will—that you met two of the victims of the flogging in a speakeasy or some such place in Oklahoma City sometime ago?

A. Later on in Oklahoma City two people were shown to me as being the victims, and I do not know who the other fellow was—a sheriff or somebody—and I later found it was a hoax pulled upon me—a hoax, a joke, a gag.

I do not remember the names of the two victims. I do not remember who they were—just a woman in the place.

I did not make any effort to corroborate this version of the story with anybody.

I never saw the tombstone inscribed to the Polish hero mentioned in my story.

I cannot produce any newspaper clippings of an actual event in which a foreign-born war hero shot up a K-u Klux parade with a machine-gun and was killed by the police as a result. But I can produce the clippings of a similar thing that that event was perhaps taken from; that was in Centralia, Washington, in some I. W. W. riots.

I cannot produce my clippings of the Centralia episode. I haven't any clippings, but the trouble out there can be found in any newspaper files, where some fellow mounted a machine-gun on a building and shot into a parade. I do not know whether he was a foreign-born war hero. It was not a K-u Klux parade he shot into. It was an American Legion parade, as I recall it.

The Court: Mr. Cunningham, had you read this story in the American Mercury?

The Witness: No, sir.

The Court: All right.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1933

No. 2903

ELIJAH WILLIAM CUNNINGHAM et al., Defendants, Appellants,

v.

WILLIAM A. S. DOUGLAS et al., Plaintiffs, Appellees

Appeal from the District Court of the United States for the District of Massachusetts

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed August 9, 1934

WILSON, J.:

This is an appeal by the defendants from a decree against them in a copyright infringement suit. We shall refer to the parties as plaintiff and defendant, as they are described in the complaint. The only questions presented by the appeal are (1) whether the District Judge committed prejudicial error, after dismissing the original complaint, in allowing an amended bill to be filed bringing in an additional party plaintiff, and (2) whether the amounts awarded by the District Court for damages and costs: $5,000 for the former and $1,500 for the latter, are in either, or in both cases, so clearly excessive as to amount to an abuse of judicial discretion.

The copyrighted matter consisted of a short story under [fol. 32] the title, "Klu Klux," written by the plaintiff, Douglas. It was published in the American Mercury Magazine for March, 1928. The copyright relied on was taken out by the publisher of that magazine, American Mercury, Inc., covering its entire contents. Shortly after publication, the publisher of the magazine executed an assignment of the rights in the story, "Klu Klux," to the plaintiff, Douglas. The original complaint was brought by him alone. The defendant objected that Douglas could not maintain the suit, on the ground that a copyright is indivisible, and inasmuch as the copyright in question covered

the entire number of the magazine, it could not be split up, and therefore the attempted assignment to Douglas of the copyright in his story was ineffective to vest in him exclusive rights in the story in question, or to empower him to bring suit for infringement of the copyright. On motion to dismiss, the facts fully appearing on the face of the original bill, the District Judge sustained the defendant's contention and granted the motion to dismiss.

The plaintiff accepted this ruling and filed a motion to be allowed to file an amended bill, which was annexed to the motion, in which the American Mercury, Inc., was joined as co-plaintiff with Douglas, and reforming the allegations of the bill accordingly. A hearing was had on this motion, but from this point there was apparently some misunderstanding as to the nature of the motion. The order of the District Court was that the plaintiff be allowed to amend the bill. The defendant's third assignment of error is that the District Court erred "In allowing the plaintiff's motion to amend the bill."

Though the action of the District Court did not strictly follow the plaintiff's motion, both parties at the hearing were present in court. All further proceedings were on the new amended bill. The order of the District Court allowing it to be filed was on May 16, 1933. The final hearing on the amended bill was not had until November, 1933, and it was held without objection by the defendants, except [fol. 33] as to the power of the District Court to join another plaintiff by amendment. We think it was within the power of the sitting justice in equity to permit the amended bill to be filed, both parties being present in court. Equity Rule 37 provides that "any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause." As it does not appear that the defendants have suffered any prejudice thereby, they take nothing under the assignment of error.

Amounts awarded as damages, or allowed as counsel fees, in copyright cases, where no actual damage is shown, it is true, are within the discretionary powers of the court, except as limited by the Copyright Act, but any such award is subject to review when there has been a clear abuse of judicial discretion. "When invoked as a guide to judicial action it [judicial discretion] means a sound discretion, that is to say, a discretion exercised not arbitrarily or wil-

fully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green, 282 U. S. 531, 541.

As the considerations on which it rests are often of a rather subtle character and difficult to present in a printed record; and as there is a wide field for individual judgment and difference of opinion in such matters, the burden of showing that there has been an abuse of the discretionary power of the court may be a heavy burden on one seeking to show an abuse of that power; but when that burden is sustained, a judgment resting thereon will be revised on appeal. See Langnes v. Green, supra, at p. 541; Commonwealth v. Murphy, 282 Mass. 593, at 598; Newton v. Concolidated Gas Co., 259 U. S. 101 and 105.

The statute relating to damages in this class of cases (17 U. S. C. A., Sec. 25) (omitting such parts of this section as have no application to this case) provides:

"If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: (b) To pay to the copyright [fol. 34] proprietor * * * in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * (omitting certain specific exceptions) and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty * * *"

The amounts "hereinafter stated" are found in four subparagraphs under paragraph (b), of which the "second" provides that:

"In the case of any work enumerated in section 5 of this title, except a painting, statute, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

Section 5 of the Copyright Act includes both periodicals and newspapers.

However, not every infringment of a copyright by a publication in a newspaper, where no actual damages are shown, requires an award "in lieu of actual damages" of

the arbitrary amount stated in paragraph "second" under Sec. 25(b), viz: $1.00 for every infringing copy of the newspaper made or sold by or found in the possession of the publisher.

In the first place, if no actual damages are shown, unless the publication is after personal notice of the copyright, and except in the special cases enumerated under para. (b), the damages are limited to $5,000; and, secondly, while Congress has arbitrarily fixed $250 as the minimum damage that may be allowed in such cases, any judgment in excess of the minimum amount fixed by the statute must first, and in all cases, be "*just.*" (Italics supplied.)

The Supreme Court in interpreting this section of the statute in Westermann Co. v. Dispatch Co., 249 U. S. 100, 106, said:

"Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual [fol. 35] damages is intended—that another measure is to be applied in making the assessment. There is no uncertainty as to what that measure is or as to its limitations. *The statute says, first, that the damages are to be such as to the court shall appear to be just;* next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than $5,000 nor less than $250, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,* but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling." (Italics supplied.)

In the present case the copyrighted story was published by the defendant company as an article of news with headlines on the front page of the Sunday edition of the news-

paper, the Boston Post. In the District Court the plaintiff's counsel agreed that it was published innocently by the defendant, the Post Publishing Co. The admission that it was published innocently by the principal also includes in effect an admission that Cunningham, the employee and agent of the Publishing Co. in gathering data for and writing special feature stories, had no knowledge that the story had been copyrighted. If the suit had been against the Publishing Co. alone, it could not have defended on the issue of damages on the ground that it had published the story ignorant of the fact that it had been copyrighted, if it was shown that Cunningham knew it was copyrighted matter.

Fletcher's Cyc. of Corp., Vol. IV, Sec. 2215; Suit v. Woodhall, 113 Mass. 391; Distilled Spirits, 11 Wall. 356; Curtis Co. v. United States, 262 U. S. 215, 222; Schneider v. Thompson, 58 Fed. (2d) 94, 96.

It may be urged that the admission in court should be construed only to cover the innocence in fact of the Pub- [fol. 36] lishing Co.; but the defendant Cunningham testified that he had never read the story published in the American Mercury Magazine; that the material facts were furnished him as an actual occurrence by a newspaper reporter who formerly worked with him on a newspaper in Dallas, Texas, and who received a certain charitable bounty therefor from Cunningham in return. There is no evidence in the case that Cunningham ever saw the story as printed in the magazine except the similarity of the subject matter, which is accounted for by the financial needs of the "down and out" reporter, Abe Martin by name, who furnished it to Cunningham. The only inference is that Martin pirated the facts from the story in the American Mercury Magazine, unless Cunningham deliberately committed perjury in court, and he, at least, is entitled to the presumption of innocence of this crime. Counsel for plaintiffs also admitted in open court that no actual damages were shown to have resulted to the plaintiffs.

The District Judge's award appears to have been based on the paragraph headed "second" of the statute above quoted. While the statute leaves much to the judgment or "discretion" of the trial judge, an award under it is made as compensation for pecuniary loss, not as a punishment. The plaintiffs undoubtedly have in law suffered

nominal damages by the infringement, and under the statute are entitled to the minimum sum named therein. Jewell-LaSalle Realty Co. v. Buck, 283 U. S. 202, 208. The provisions of the "second" paragraph under (b), even when actual damages are shown, but the amount is not susceptible of proof, merely permit justice to be done. They are not intended to open the door to punitive or arbitrary awards, having no relation to actual damages.

The award of $5,000 as damages in this case under "the circumstances of the infringement", as disclosed by the admissions of counsel and the uncontradicted evidence, is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

[fol. 37] Where no actual damages are proven or are shown to have resulted, there has been a clearly marked tendency by the courts to limit the award in lieu of actual damages to the minimum amount. See Insurance Press v. Ford Motor Co., 255 Fed. 896; Altman v. New Haven Union Co., 254 Fed. 113; Fisher, Inc. v. Dillingham, 298 Fed. 145; Sauer v. Detroit Times, 247 Fed. 687; Waterson et al. v. Tollefson, 253 Fed. 859; Cravens v. Retail Credit Men's Assn., 26 Fed. (2d) 833. Under the circumstances of this case, we think the maximum amount which could reasonably be awarded "in lieu of actual damages" should not exceed the minimum sum of $250 fixed in the statute, and that the decree of the District Court should be reversed in this particular.

As to counsel fees: The original suit was not justified. While the allowance for counsel fees should constitute a fair compensation for the professional work required, compensation for the work on the original bill, which was dismissed, should not be included, except in so far as it may have been essential as a preparation for the conduct of the case at the trial on the amended bill. Compensation of counsel in copyright cases, to be taxed as costs, is within the discretion of the court, yet if an amount allowed is so clearly unreasonable as to amount to an abuse of judicial discretion, it may be revised on appeal. In Marks v. Feist, Inc., 8 Fed. (2d) 460, an allowance of $1500 as counsel fees under this statute was reduced to $500. In Universal Film Mfg. Co. v. Copperman et al., 218 Fed. 577, Judge Hough sitting in the District Court made an allowance of $250, in a copyright case which was affirmed on appeal.

Each case, of course, depends on its own facts and no two will be precisely alike. The present case, at least, on the amended bill, involved no unusual difficulties or complications. The trial on the amended bill was brief. The infringement was admitted. Only the issue of damages and counsel fees were involved. It seems clear that the al- [fol. 38] lowance of $1500 as counsel fees was unreasonably excessive. We think they should not exceed $750.

The decree of the District Court is reversed as to the amount of damages and costs, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed Aug. 9, 1934

BINGHAM, J. (dissenting):

The original bill filed in this case August 2, 1932, was heard on defendants' motion to dismiss April 10, 1933, and the motion was granted April 14, 1933. Thereafter, on April 18, 1933, the plaintiff filed a motion "for leave to file an amended bill of complaint, amended by adding the American Mercury, Inc., as a party plaintiff, and in other respects," attaching thereto the present so-called amended bill. On May 16, 1933, after hearing, an order was entered allowing the plaintiff's motion, and the so-called amended bill having been filed, on November 10, 1933, the parties were heard by the court "on the pleadings and evidence." Upon completion of the hearing the matter was taken under advisement and the case continued until the December term, 1933, when, on December 14, 1933, the court announced that a decree would be entered in favor of the plaintiffs. January 2, 1934, a decree was entered in favor of the plaintiffs—that they recover of the defendants "in lieu of actual damages or profits, the sum of five thousand dollars ($5,000), and in addition a reasonable attorney's fee of fifteen hundred dollars ($1500)."

It is from that decree that the defendants prosecute this appeal. In their assignments of error they complain among other things that the court erred (1) in allowing the motion of the plaintiff to amend the bill; (2) in assessing

damages in the sum of $5,000; (3) that it abused its discretion in awarding damages in the sum of $5,000; (4) that it erred in awarding the sum of $1,500 as a counsel fee; and (5) that it abused its discretion in awarding the sum of $1,500 as a counsel fee.

I agree that the defendants take nothing by their first assignment of error. It is apparently based upon a misconception of the plaintiff's motion. That motion was not [fol. 39] to amend the bill, but for leave to file an amended or new bill. The original bill had been dismissed and, having been dismissed, there was nothing in court by which to amend. The motion for leave to file an amended or new bill having been granted and the bill filed, and the parties having appeared in court and been fully heard thereon, the defendants cannot now complain because they may have misunderstood the plaintiff's motion.

The second assignment of error is evidently based upon the idea that the court was without authority to assess damages in the sum of $5,000 or any other sum, no actual damages having been shown. In the prayer of the bill the plaintiffs asked for actual damages or, in the alternative, "in lieu of actual damages or profits, such damages as to this court shall appear to be just and proper within the provisions of the act of Congress in such cases made and provided," and, it being conceded at the trial that no actual damages were shown, the damages awarded were in lieu of actual damages and profits under Sec. 25, Title 17, of the U. S. C. A. The question raised by this assignment of error, therefore, is whether, in the absence of proof of actual damages, the court was authorized to make an award, in lieu of actual damages and profits, under Sec. 25 of the Copyright Act. That section in part provides:

"§ 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * * *

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such

damages the court may, in its discretion, allow the amounts as hereinafter stated, but [here follow certain specific cases not here involved], and such damages shall in no other case exceed the sum of $5,000 nor be less than $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the [fol. 40] limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him."

Then follows the so-called schedule of cases in which damages may be awarded and stating the terms and manner of arriving at the damages awarded, of which the second item is:

"Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees."

The plaintiffs' work was one enumerated in Section 5. And it appeared in evidence that the defendants, in getting out their edition of the Boston Sunday Post of August 30, 1931, made 384,834 infringing copies of the plaintiffs' work, which they sold. And at the trial the defendants admitted that the plaintiffs' work was duly copyrighted, that the copyright was owned by the plaintiffs, and that they had infringed it; and the plaintiffs admitted that they had shown no actual damage.

There can be no question that, inasmuch as there was no proof of actual damage, the court was authorized to assess damages, in lieu of actual damages, under and in accordance with the provisions of the statute applicable to a work of the character of the plaintiffs and infringed in the manner above specified; and the only question remaining upon this branch of the case is whether the trial court, in awarding damages in the sum of five thousand dollars, abused its discretion.

As there was but a single infringement of the plaintiffs' work (Westermann v. Dispatch Printing Co., 249 U. S. 100), the court, under the statute, was required to assess a sum not less than $250; and, such sum being fixed by Congress in the statute, it is to be presumed to be just

within the meaning of the act; and subdivision second specifically provides that in the case of a work such as that of the plaintiffs the court may award "$1 for every infringing copy made or sold by or found in the possession [fol. 41] of the infringer or his agents or employees," limited, as specified in (b), not to "exceed the sum of $5,000." If the sum of $250, which the statute prescribes shall be awarded for an infringement consisting of the making of a single copy, is just within the meainng of Section 25(b), then, on proof showing the making of additional infringing copies up to 5,000 or over, an award of $5,000, as fixed by the statute, is likewise to be regarded as just within its meaning. Under the statute, had the infringement consisted in the making of a single copy or of 250 copies the plaintiffs would have been entitled to only $250 as a just award. But on its appearing that the defendants made 384,834 infringing copies instead of one or 250, the question is: Whether the District Judge can be said to have abused his discretion by following the terms of the statute and awarding a dollar a copy for at least 5,000 copies of the total number of infringing copies made and sold. To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5,000, abused his discretion, would be a travesty on the law and in effect to read out of the statute the provisions of Section 25(b) and subdivision second, authorizing an award of "$1 for every infringing copy made or sold" up to $5,000.

In my opinion the award of the trial court was authorized and not an absue of discretion. An award of damages within the statutory limits cannot be an abuse of discretion in the case of an infringement and sale of infringing copies of the nature and number here shown, and I fail to see wherein this construction of the act, as applied to the circumstances of this case, conflicts or is not in accord with what was held in the two cases decided by the Supreme Court (Westermann v. Dispatch Printing Co., supra; Jewell-LaSalle Realty Co., v. Buck, 283 U. S. 202) construing this act.

Now as to the attorney's fee. Section 40 of the Copyright Act authorizes the court in its discretion to award a reasonable attorney's fee. The court in this instance [fol. 42] awarded $1,500. The evidence shows that the services rendered for which this award was made covered

at least one hundred hours, a substantial portion of which was devoted to the preparatoin and hearing of the original bill, which was dismissed. The question considered at the hearing on the motion to dismiss the original bill related solely to whether William A. S. Douglas, the sole plaintiff in that bill (could maintain the suit, for it appeared in the bill that the plaintiff's work or story was published by The American Mercury, Inc., in its magazine or periodical called The American Mercury, together with other matters, and that the copyright was obtained by The American Mercury, Inc., on an edition of the magazine as a whole. The question was whether, under such circumstances and it appearing that The American Mercury, Inc. had given to Douglas what purported to be an assignment of the copyright to the extent that it covered his work, this was sufficient to enable him to maintain the suit. Some of the legal services rendered concerned that question and undoubtedly had to do with other things arising under the original bill. These services, although they in no way concerned the present suit, were taken into consideration in awarding the attorney's fee of $1,500. This manifestly was not authorized and was an abuse of power, but, as the record stands, I do not see how this court can determine what amount can be justly awarded as an attorney's fee, as the court in this case has done.

As to this, it seems to me the case should be remanded to the District Court for determination of the amount and that no sum should be awarded based on services not necessary to the preparation and trial of the action under the present bill.

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[fols. 43-46] IN UNITED STATES CIRCUIT COURT OF APPEALS

MINUTE ENTRY OF HEARING

On April 19 and 20, 1934, this case came on to be heard, and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the ninth day of August, A. D. 1934, the opinion of the court (page 31) and a dissenting opinion by Bingham, J. (page 38) were filed, and the following Final Decree was entered:

## In United States Circuit Court of Appeals

### Final Decree—August 9, 1934

This cause came on to be heard April 19 and 20, 1934, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, August 9, 1934, here ordered, adjudged and decree as follows: The decree of the District Court is reversed as to the amount of damages and costs, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day; the appellants recover costs in this court.

By the Court.

Arthur I. Charron, Clerk.

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### Recital re Issuance of Mandate

Thereafter, to wit, on September 26, 1934, mandate issued to the District Court.

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Clerk's Certificate to foregoing transcript omitted in printing.

1 Exhibit 41

# The AMERICAN MERCURY

VOLUME XIII March 1928 NUMBER 51

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Published monthly at 50 cents a copy. Annual subscription, $5.00; Canadian subscription, $5.50; foreign subscription, $6.00; all rag edition, $10.00 by the year. The American Mercury, Inc., publishers. Publication office, Federal and 19th streets, Camden, N. J. Editorial and general offices, 730 Fifth avenue, New York. London office, 37 Bedford Square, London W. C. 1, England. . . . Printed in the United States
Copyright, 1928, by The American Mercury, Inc. . .
Entered as second class matter January 4, 1924, at the post office at Camden, N. J., under the Act of March 3, 1879. Published monthly on the 25th of the month preceding the date. Five weeks' advance notice required for change of subscribers' addresses.

Alfred A. Knopf, *Publisher*
H. L. Mencken, *Editor*
George Jean Nathan, *Contributing Editor*

# KU KLUX

BY W. A. S. DOUGLAS

I HAD hunted oil in that little Oklahoma town several years before and made some friends among its people. I drilled two dry holes there, and then quit. Passing through again a while ago on my way to Dallas, I stopped off for a few hours for the purpose of drinking some Choctaw beer, a sweet, sour, potent beverage which all the might and power of the Anti-Saloon League has failed to stop Lo from brewing, drinking and selling.

I headed for a joint where I felt sure of a hearty welcome. It was still run by Lizzie Gritts, a corpulent, smiling old Creek tribeswoman, black as the blackest Ethiopian, and, I should say, about as pure-bred a Negro as the late Booker T. Washington. But Lizzie was officially an Indian, with all the privileges pertaining to that status, for the Creeks had given her ancestors sanctuary back in slavery days, adopting them into the tribe and mixing the breeds. Lizzie must have been a throw-back to the pure African strain, for there were no signs of a Creek about her. Even her speech was Aframerican.

I drank two bottles of her beer, and waited to talk of old times until two Katy freight trains, going in opposite directions, had stopped bowing and scraping to each other on the tracks outside her open front door. Gradually there came quiet and we grew reminiscent over the oil boom that had turned this settlement into a noisy city for a few months and then reduced it over-night into a deserted village. I wanted to know particularly about the death of Adam Kapechik, a big blond Polak who used to mend my boots and those of the other drillers.

"I read in the papers," I told her, "that he went crazy at a Fourth of July parade and started shooting at the marchers. And then when the sheriff went after him he fought back and they had to kill him. I heard he had shell-shock when he was in the marines. Must have hit him again, sudden-like."

Lizzie was gurgling a bottle of beer. She put it down on the table and stared at me a moment, her eyes almost popping out of her honest old black hide.

"Is you-all Ku Klux?" she demanded. "I asks you is you-all Ku Klux?"

"Not by a damn sight," I hastened to reply. "In the first place, I'm ineligible—born in the Old Country and therefore not a 100% American. Second place, I'm agin 'em."

Lizzie took another long slug, put down the bottle, wiped her mouth with the back of her hand, scrutinized me for a full minute, and spoke again.

"Ku Klux got dat boy Adam," she said and stopped short.

"Why, I heard they put up a monument to him," I answered in wonderment. "He was the war-hero of this man's town, and I understood they just figured he went out of his head when he did the killing."

Lizzie was at the ice-box now, pulling the caps off two more cold bottles.

"Dat's what de papers said," she replied as she came forward with a flagon in either fist. "De gemman what sent out de word from here he's a Ku Klux and de boys all had him fix it dat way. Nobody never comes around here t'argue 'bout it. Don'no as I should be a-telling you-all."

I kept her running back and forth from

# KU KLUX

BY W. A. S. DOUGLAS

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I kept her running back and forth from

the ice-box to the table until I had her thoroughly oiled and very talkative. Before I left she had given me the tale.

Next morning, before the Dallas train was due to leave, I dropped round to the cemetery. I halted at last before a big granite shaft which bore the following inscription:

> Sacred to the Memory of Adam Kapechik,
> Late Private, United States Marine Corps.
> Born in Poland, August 19th, 1894.
> Died in this City, July 4th, 1924.
>
> He fought as a volunteer in the army of his adopted country during the World War and was severely wounded in the engagement with the enemy at Chateau Thierry. He was twice decorated for individual heroism.
>
> The effect of his injuries was such that his mind gave way during the progress of a patriotic parade. He fired a machine-gun into the midst of the marchers, killing two of his fellow citizens. He was himself unavoidably slain while attempts were being made to overcome him.
>
> Realizing that he was unaware of what he did, this monument has been erected by popular subscription of his neighbors. Among the donors were the families which were bereaved by his act of madness.
>
> May His Soul Rest in Peace

At the foot of the inscription, and set in the stone behind a piece of plate-glass, were the four medals which Adam Kapechik had won in the war.

Lizzie Gritts had told me to look up Round Heels for corroboration and further details of the story. I did not get to the Smackover oil-fields until several weeks later, but I found Round Heels the first night in Joe Yancey's dance-hall.

She had certainly developed into a tough baby—soured, dopy, drink-sodden and looking forty instead of what she was, around twenty-two. You will know how hard she had become when I tell you she charged me five dollars to take a look at the thong marks on her back. In the old days she had been just a sweet, easy little kid, a bit too generous with her favors—which accounts for the name they gave her.

Anyway, she checked up Lizzie's story and gave me a lot more details, buttered in among curses and dragged out of her with slugs of Joe Yancey's corn liquor. Between her and the old black Creek I got what I am now setting down.

## II

Adam Kapechik had wormed his way out of Warsaw and managed to make the safety of Copenhagen without being picked up by the patrols hunting more cannon-fodder. Not that Adam was any sort of a coward. But he was trying to get to the pot of gold at the end of the rainbow which he knew as the United States, and no war was going to stop him.

However, he landed in New York just in time to see the pot of gold, so to speak, take up arms itself. Adam, wandering around the streets, fell in love with the red stripes on a marine sergeant's pants and got into talk with the wearer. Before he knew what had happened to him he was a marine himself and was picking up the rudiments of "To the rear, march!" on the Quantico parade-ground.

He learned to be a marine quicker than he got hold of the English language, but as that did not hinder his fighting qualifications he went across with the first replacements and in due time became an excellent machine-gunner. While it is true that he was hit on the shoulder by a chunk of shrapnel, there is no proof that he was ever marked up for anything more than an average dose of first-contact shell-shock. Certainly not enough to set him off berserk, as the inscription on his tombstone was to say later on.

Adam got his discharge in 1920, and, having saved up a few dollars and won American citizenship by virtue of his war service, he cast around for a spot to light on. His hunt ended in the little Oklahoma oil-town where he is buried today. Being a shoemaker by trade, he opened up a little workshop, and soon he was doing as well as the next fellow.

Most everybody liked him. He was a big blond, smiling boy with a kind word or a joke in his broken English for everyone who came around. A crowd of the boys who had been in the war started to make a hang-out of his little store. He put in a shine-stand and a case of cigars and

cigarettes. He had everything he wanted now but a girl. Judged by Oklahoma standards he was dumb, what with his Old World ways. The fact didn't set him in so good with the flappers.

The Ku Klux Klan and Adam both got to going good about the same time in that neck of the woods. The local klavern was started off by a professional plugger who liked the lay-out down there so well that he decided to stick. He made the town his headquarters and worked all over the State, so that he came to be a high muck-a-muck, big enough to challenge the gang down in Atlanta and get away with it—for a while. Women and booze were his meat and they nabbed him in the end with a combination of both. He's doing a long stretch for murder right now.

Faulkner, his name was. A short, scrubby, little man, all puffed up like a pouter pigeon. Acted decent enough till he got his hooks into the county and State political machinery. From then on he was hard-boiled. He got away with so much that he figured no thing or person could stop him. He has been made aware of his error since then.

Right off the line he sold himself to Dr. Dody, the Baptist minister. The boys who hung around Adam's shoe shop used to call the doctor Old Horse Teeth. He was a tall, skinny man with long arms and bent legs like one of those big wicked monkeys. He had a greasy grin for the women, especially the young ones.

Well, the parson gathered in a lot of his church folks for the Klan organizer—it was whispered they split the commissions—and first thing you knew he had all the bankers and the storekeepers. This made old Narcissus Harper, the Methodist preacher, sorer than Hell. But Faulkner soft-soaped him and got him to ride along by giving him an office. Cyclops or something like that.

Inside of a month all the big bugs in town had their nightshirts and pillow cases and were sneaking once a week into what used to be the Odd Fellows' Hall, but what was now a full-fledged klavern, with a fiery cross blazing on the roof every night in red electric lights.

At the go-off the young fellows laid away from it. They had lots of fun watching the monthly parade from their usual hang-out at Adam's store. They used to play a game of picking out the Koo-Koos by their walk. Adam himself didn't depend on the strut. He could recognize the shoes he had cobbled, and always beat the rest of the gang in guessing.

The Klan would swing along Main street every fourth Friday night. The band was only four men at the start, but it made noise aplenty. Faulkner would be in the lead, all robed in white and gold and red, and riding Jess Mackintosh's old white mare, the one with a touch of the blind staggers.

"There's Fatty McGahan, the Ford dealer," one of the boys would shout from Adam's doorstep. "Hey, Fatty, pull in your belly, you can't fool me!"

Of course you couldn't see Fatty's face through the pillow slip, but you just knew he was madder than all Hell.

"And look at Limpy Squires dragging his nighty in the mud! Hey, Limpy, God help you when you climb into bed to-night with all that muck on your tails!"

There were certain ones they would make fun of and there were others they'd be careful about, such as old Horse Teeth and Jeremiah Slades, the banker. They knew better than to make any wise cracks about those two. They did poke fun at the Rev. Narcissus Harper, who was knock-kneed and could be spotted a mile away, but they stopped picking on him when young John Hawley's dad ran him out of town at the preacher's complaint. Old Hawley was in the Klan and he told the boy he was through with him and to go jump a freight train. The boy beat it and his mother died inside of three months. There were folks around that blamed her passing on the Klan.

The whole thing was a jumble to Adam Kapechik. You see, he still wasn't any-

thing more than a greenhorn. He even wanted to join up when Joe the dairyman went in, and you could have knocked him down with a toothpick when they told him he could never be a hundred-per-center as long as he did not possess an American birth certificate.

From its being a laughing stock, this klavern got to be something that even the young fellows were scared of. The first straight tip they got to quit kidding the organization came when Faulkner and the Rev. Mr. Dody raided Panhandle Jessie's joint down on the Katy tracks, a few doors below Lizzie Gritts' place.

Jessie had the habit of going a bit further than Lizzie in that she had some young girls around as well as some cases of Choctaw beer and a jug of corn. Faulkner and Dody came busting in there one Saturday night when the piano was going and there was a bit of dancing. There were about thirty who broke the door, all in nighties. They caught five of the gang that made Adam's store their hang-out and they gave each of them three cracks with a leather whip right out there on the railroad tracks.

Then they loaded Jessie and three girls into a car and put them on the three o'clock morning train for Oklahoma City. Warned them not to come back for their duds, either. All they started them off in was the flimsies they were wearing in the house. Dead of Winter too.

Bit by bit it got to be nosed around that the only way for a fellow to guarantee himself a good time without getting in jams was to join the Klan. It was common talk that Faulkner himself would chase a skirt twenty miles barefoot on the chance of a date. He'd been seen in Oklahoma City more than once with some fast looking babies. He wouldn't have dared do this at the start but he'd got so now that he was pretty near bossing the State. Talking of running for Congress, too.

There came a handful of other raids with more whippings of young fellows, and girls put on a rail, near naked, and run down to the three o'clock Katy speeder for the West. And every time it would happen there would follow a big recruiting for the Klan. It came so that about six months after Faulkner had blown into town the only guys who didn't belong were Adam the Polak, five Jew storekeepers, nineteen Roman Catholics, the Red Indians who wore blankets or sold beer, and the Negroes.

However, it didn't bother Adam much, even if they wouldn't let him in. The gang still hung around his store, but, being Klansmen now, they wouldn't be around on parade nights to kid the marchers. Instead they would be tramping along behind Faulkner and the old white mare with the staggers. But they didn't mend their ways any. Instead, they got worse, for they figured they were now safe. Jessie even came back to town and set up again after one of the boys who had got whipped over her told her he was a Kluxer now and she could go the limit. So she brought nine girls with her instead of three. Faulkner took a shine to one of the new babies and they said he was a regular customer now.

## III

I spoke earlier in this yarn about Adam liking the girls. In a decent way, of course. The boy was clean, and he never had any part in the rough talk that went around his place sometimes at night. He just didn't get it. But he was lonely, and pretty nearly any girl who would have made up to him could have got a right fine fellow for a husband, and all this trouble that is going to be set down here would never have happened.

He did have his eye on one, but he couldn't make much headway with her. This was the kid the boys called Round Heels—behind her back, of course. At the time these things were happening she was about eighteen years old and as pretty as they make them. A little blonde with a smile for everybody. She had no folks

in town, having blown in from the country, over by the Arkansas border. She worked in a notions store and when her day's stint was done she had nothing on her mind or in her eye but a good time with the boys.

She got herself a bad name right away. I guess she deserved it according to the letter of the law, though not according to the teachings of the Man whose representative hereabouts was old Horse Teeth Dody. She was easy. Thousands like her all over the world, doing no harm to anybody but themselves.

The boys had passed the news around. They talked about it in Adam's store, but he never got it quite clear. He saw the other lads dating her up, and at last he mustered the courage to try it out himself. She turned him down but was nice about it. The kid was all puffed up with her popularity and couldn't tell the difference between an honest-to-God man and a lot of chippy-chasers. Adam was just a dumb Polak to her.

He never had the nerve to try again, but he would look at her calf-eyed when she came in to have her shoes shined or fixed. One time he did get something of the drift of a crack that was made about her and flattened the boy who was talking with one left-handed swing. Kept his foot on the lad's neck till he took it back, every word.

Judging by the way things came out afterward he must have been crazy over Round Heels. You see, he was just a tight-mouthed Old Country boy, dumb, and not here long enough to know how to wise-crack the girls.

Faulkner got his eyes on her at last. It happened one evening when she was coming home from work. He ran his car alongside of her for about five blocks, trying to strike up. Now, she could be picked easy enough, but as I said before, she was desired by all the good-looking kids around her own age, was a snappy looking baby and was still choosing, even though they had given her a bad name.

Anyhow, she ritzed Faulkner. And that wasn't the half of it. She told the story over at the drug-store that night and a guy who overheard it carried it right back to the Klansman.

"Who does he think he is, the little pot-bellied shrimp?" she squealed over the top of her banana-split. "A dirty little old man trying to chase girls young enough to be his daughters! I don't care if he was the Imperial Wizard himself—I'll teach him to be fresh with me! The way I told him off he'll not bother me again."

Faulkner just burned up when they carried this back to him. He was about as mean as a rattlesnake and he knew something already about Round Heels chasing around. Anyhow, that night and for many nights afterward, he had her trailed, and I guess he got her to rights more than once. She had a special sweetie, Johnny Sakheimer, whose father kept a gents' furnishing place on the main street. They were Jews, but in spite of the Klan having the town by the ears Johnny was about as popular a kid as there was around. He played a bit, sure enough, but wasn't any worse than the others. But he was a Jew and that fitted in with Faulkner's plans to stir up the boys in the nightgowns.

Faulkner had lined up things so good while he was trailing the two that he had the trysting place and the time all spotted and mapped out. So about ten o'clock on a Summer's night about forty picked Klansmen, robed and all, closed in around Johnny's coupé where it was sitting under a tree on a country road and pulled therefrom the boy and the girl.

What happened after that I'll set down in Round Heels' own words as she told me the story in Joe Yancey's dance-hall in Smackover. As I said before, I had given her five dollars to let me see the scars on her back, and after drinking nearly a quart of corn liquor she spilled the yarn just about as old Lizzie Gritts had outlined it to me.

"So help me, God, all we were doing

was sitting there and loving up a little. Nothing wrong. I'm not saying I'd been what you call a good girl before this happened, but that night we weren't doing a damn thing but kissing and hugging. We were crazy about each other at that time.

"The first thing I knew all these guys in white robes rose around us. I was scared to death. I squealed holy murder. They threw open the doors and a big fellow grabbed me. I think it was Parson Dody, but I couldn't swear to it. He stuffed a handkerchief down my throat. I kicked so hard it took five of them to drag me into a big car. Johnny was fighting like Hell behind me. I heard them calling him a dirty Jew.

"'You will lay around with our women and make them prostitutes,' I heard someone shout, and then they must have landed on him hard, for he was still. They loaded him into another car behind us and started off.

"A fellow took the handkerchief out of my mouth and I started to holler again. So they put it back and tied another one across my face so I couldn't spit it out. There were a dozen of them in the car and they had their hands all over me in the dark. Laughing while they were doing it.

"They drove us out about five miles to a little hollow with fir trees around it. Then they dragged me out and laid me on the grass. Did I tell you they had tied my feet and hands with handkerchiefs? Well, they did.

"They tumbled Johnny out. He was still dazed from that wallop. They pulled off his coat and shirt and tore his underwear from him so he was stripped from his trousers up.

"They tied him up to a tree with his hands over his head. And they put a rope round his knees to keep them close to the trunk. Then they made a circle round him with me just inside of it, lying on the ground.

"A guy stepped out from the bunch with a whip. Just a short mule-wagon whip. He beat Johnny about five times over the back before he let out a holler. Then he gave him about fifteen more, with the kid yelling his head off. He was all blood when the bird that was whipping him laid off. But he stopped hollering when they let him loose. Just dropped to the ground, moaning.

"They pulled him out of the way. Now it was my turn. I was fighting like a wildcat. Scared stiff but game, if I say it myself. They got me over to the tree and hitched up my hands by a rope to a branch over my head. Then they tied my knees like they tied Johnny's. I still had all my clothes on.

"The big guy, I am sure it was Parson Dody, came up and cut my dress from me with a knife. I had knickers and a shimmy on below. Most times I don't wear the knickers and I might just as well not have this night for all the good they did me. Then they backed away. I was waiting for the whip.

"'Pull off her shimmy!' someone hollered. And half a dozen others yelled out the same thing.

"'Pull off her shimmy!'

"I felt a hand on me and then a yank. It was torn right from me. But still they weren't satisfied.

"'Strip her!' yelled two-or three-more of them.

"The fellow behind me just took my knickers by the elastic and pulled them down so they were round my knees. I was naked from there up.

"And then they laid that lash on me! God in Heaven! Ten times that I counted! I think they stopped at that, but I couldn't swear to it. I don't know another thing about it till I came to, laying on my face in Lizzie Gritts' parlor. She was pouring corn liquor on the cuts and Adam Kapechik was standing beside her."

That was Round Heels' story. As she finished it, sitting in that cubicle in a Smackover dance-hall, she opened her waist, pulled it to one side and showed

me her right breast. The nipple was split clean in half.

"I'll throw in that exhibit without any extra charge," she said. "That's where the end of the lash came around and caught me."

## IV

It was Adam Kapechik who found Round Heels lying by the roadside in her shoes, stockings and knickers and with her torn dress thrown across her shoulders, stuck there by the blood on her back. It was his habit to take a walk before going to bed and chance sent him in that direction. The Klansmen had dumped her out inside the city limits the same as they had done for Johnny Sakheimer. Johnny managed to get home some way and a week later his whole family left town. On orders, it was whispered.

Adam carried Round Heels the mile and a half to Lizzie Gritts' house. Lizzie was a good friend of his. The only dissipation he went in for was drinking her beer. He stayed there all night watching old Lizzie, who doctored the kid's back with corn liquor to clean it and chicken-fat to heal it.

In the morning he lit out. This was the third of July and the Klan was to have the biggest parade of its history in this town on the Fourth. Three big bands, a full gathering of all the hooded hosts in the county, the Civil War men, the Legion boys, and the boy scouts.

The way things happened, Adam must have been completely out of his mind—but like many maniacs he went about things systematically. First he drove his flivver to Oklahoma City. He belonged to the National Guard and got into the armory without any trouble. He came out the back way with two or three packages and loaded them into his car. He had swiped an old machine-gun, pretty well shot. And one of the packages was a hundred rounds of ammunition. Also, he took his rifle and bayonet out of the company rack.

He must have hid the artillery in his shoe-shop overnight, for afterwards people told of his carrying bundles to the roof of the McMaster Building at the top of Main street. They said this was about noon on the Fourth. Nobody paid much attention, thinking he was doing some work for the store.

All the night of the third he sat beside Round Heels, who was lying on a bed in Lizzie Gritts' parlor. Another sure proof that he was crazy was that after petting her all night—just with words—he asked her to marry him and told her they would go off to some other town if she would. The kid agreed, though she probably didn't know what she was saying—being in a fever and all. He told her he would come back with a minister "after the war," so you can see he was clean off his base.

The big parade was to start at three o'clock. The route was up Main street from First, past the reviewing stand at Eighth and on to Fifteenth and Spruce, where they were to disband. The McMaster Building was at the corner of Sixth and Main. A big Klansman from Atlanta was to review the marchers, and Faulkner was to be in the stand beside him with a lot of other high muck-a-mucks. Lucky for that boy he *was* in the stand.

They came swinging uptown out of First street about a quarter past three. Everybody in town had turned out except poor little Round Heels and Lizzie Gritts, who was nursing her. On the coping of the McMaster Building were stuck two American flags. Nobody thought to look closely between them. If they had they might have caught the glint from the nozzle of a machine-gun. Behind it was crouched Adam Kapechik, crazy as a March hare, wearing his overseas uniform, his war medals and a full pack. Beside him lay his rifle and bayonet. What he figured was that he was back in the trenches sure enough.

The Klan was leading the procession and the band ahead of it was playing the

"Klexology." All the boys were singing it out loud. The tune is "America" and these are the words:

God of Eternity,
Guide, guard our great country,
Our homes and store.
Keep our great State to Thee,
Its people right and free,
In us Thy glory be
Forevermore.

Crazy Adam got his gun into action at about a hundred yards. Picked off two at the first crack. The Rev. Narcissus Harper through the forehead, and John Hughes, the butcher, through the stomach. Then something happened that saved the entire klavern of Klansmen from annihilation. The old machine-gun jammed.

Sheriff John Kruger, a man you have to hand it to for guts, whipped off his nightie and pillow-case and tore up the fire escape of the McMaster Building while the mob was ducking for cover and Butcher Hughes was kicking up his heels in the road.

Two cops followed Kruger with their revolvers out. Adam had given up hope of getting the machine-gun to work again and had taken to his rifle. He was nestling the butt into his shoulder and drawing a bead on the panicky mob below when Kruger came bounding off the fire-escape.

Adam turned just a fraction of a second too late. The sheriff caught him on the swing and drilled him clean through the side of the head. He never knew he had been hit.

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54] Clerk's Certificate to foregoing exhibits omitted in printing.

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[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Endorsed on cover: File No. 39,147. U. S. Circuit Court of Appeals, First Circuit. Term No. 519. William A. S. Douglas and The American Mercury, Inc., Petitioners, vs. Elijah William Cunningham and Post Publishing Company. Petition for a writ of certiorari and exhibit thereto. Filed November 7, 1934. File No. 519, O. T. 1934.

(5735-C)

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 519

WILLIAM A. S. DOUGLAS and THE AMERICAN MERCURY, Inc.,
Petitioners,

v.

ELIJAH WILLIAM CUNNINGHAM and POST PUBLISHING COMPANY,
Respondents.

## PETITION FOR WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

## BRIEF IN SUPPORT OF THE SAME.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No.

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

*v.*

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

## PETITION FOR A WRIT OF CERTIORARI

### TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners, William A. S. Douglas and The American Mercury, Inc., plaintiffs, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the First Circuit to review a judgment of that Court entered on August 9, 1934.

### SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was a suit in equity brought by the petitioners in the United States District Court of Massachusetts to enjoin and recover damages for the infringement of the copyrighted short story "Ku Klux" written by W. A. S. Douglas and published in The American Mercury for March, 1928, No. 51, Vol. 13. The copyright was duly registered by The American Mercury, Inc. after publication with notice of copyright. Subsequently, the copyright in the short story was assigned to the petitioner Douglas, who at

the time of the infringement was, and now is, the sole owner of the entire copyright and all rights in the short story.

The infringement charged is the publication of the same story in the Boston Sunday Post of August 30, 1931, published by respondent, Post Publishing Company. The respondent Cunningham, under the name "Bill Cunningham", had rewritten the story in his own words, giving the characters different names, but using the identical plot. The infringing story began on the front page of the first news section of the Sunday issue, under the title "Klan Killed Hero of War", and was written up and published as news, although all the episodes and characters were entirely fictitious. Respondents admitted both the infringement and the validity of the copyright, and that 384,834 copies of the Sunday Post containing the infringing story were printed (Rec. p. 20). The only question left for the District Court, therefore, was the amount of damages.

The petitioners offered evidence showing the substantial value of the story "Ku Klux" and that it had been regarded as of great value by publishers, motion picture and stage people and others qualified to judge (Rec. p. 18 and Addendum, pp. 4 and 6).

The respondent Cunningham testified that he got the story from another news reporter. His testimony was entirely uncorroborated and in response to a direct question from the Court, Cunningham stated that he had not read Mr. Douglas' story in The American Mercury (Addendum to Rec. pp. 6–8).

Petitioners admitted at the trial the innocent infringement by the respondent, Post Publishing Company (Rec. p. 18), but at no time have they conceded the innocence of the respondent Cunningham, and, in fact, flatly deny it.

The petitioners relied upon the statutory damages which might be awarded by the court in lieu of actual damages, under Section 25 of the Copyright Act (Title 17, U. S. Code, Sec. 25). On all the evidence and at the close of the case, the District Judge (Lowell) granted an injunction and awarded petitioners $5000 as damages, $1500 as a reasonable attoney's fee, and costs (Rec. pp. 20–21). This is at the rate of $1 per infringing copy up to 5000 copies.

District Judge Lowell was taken ill shortly after rendering his

decision and died before the final decree was signed. The final decree, therefore, was signed by Judge Brewster of the District Court, District of Massachusetts (Rec. pp. 12–13). See decision of Judge Brewster Rec. pp. 14–16.

On appeal, the Circuit Court of Appeals for the First Circuit (Judge Bingham dissenting) held the award of $5000 to be so unreasonable and unjust as to amount to an abuse of the discretion given the Court under Section 25 of the Copyright Act, and reduced the award of damages to $250, the minimum permitted by the Act, and reduced the attorney's fee to $750.

The decision of the Court of Appeals conflicts squarely with the express language of Section 25 of the Copyright Act, with the decisions of this Court, and with the decisions of other Circuit Courts of Appeal.

The power of the District Court to award statutory damages is clearly defined in Section 25 of the Copyright Act and within the minimum and maximum limits of $250 to $5000 therein provided is purely discretionary. The decisions of this Court and other courts have regularly upheld the discretionary power of the District Court within the limits laid down by the Statute.

Section 25 of the Copyright Act, so far as here applicable, provides as follows:

> "Section 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . .
>
> Second. In the case of any work enumerated in Section 5 of this title, except a painting, statue, or sculpture, $1 for every

infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

The decision of the Court of Appeals disregards the plain intent of Congress and reads out of Section 25 of the Copyright Act the express provision for the award of maximum damages of $5000, and, in effect, limits the amount of statutory damages which may be awarded in lieu of actual damages to the minimum of $250, in every case.

The decision squarely conflicts with the decisions of this Court in the following cases:

*L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100.

*Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202.

Also with the decisions of other Circuit Courts of Appeal in the following cases:

*S. E. Hendricks Co.* v. *Thomas Publishing Co.*, 242 Fed. 37, 41 (C. C. A. 2d).

*Campbell* v. *Wireback*, 269 Fed. 372, 375 (C. C. A. 4th).

*No-Leak-O Piston Ring Co.* v. *Norris*, 277 Fed. 951, 954 (C. C. A. 4th).

*M. Witmark & Sons* v. *Pastime Amusement Co.*, 2 Fed. (2d) 1020 (C. C. A. 4th), affirming the District Court, E. D. South Carolina in 298 Fed. 470, 480–482.

## QUESTIONS RAISED BY THE CASE.

This case therefore raises the following questions:

1. Whether the District Court is empowered by Section 25 of the Copyright Act to award, in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages, in its discretion, to allow $1 for every infringing copy made and sold by the infringer, except that such damages shall not exceed the sum of $5000, nor be less than the sum of $250?

2. Whether under Section 25 of the Copyright Act, the allowance by the District Court of $5000 as damages in lieu of actual damages constitutes an abuse of the District Court's discretion, where

the respondents made and sold more than 5000 infringing copies of the petitioners' short story?

3. Whether, where Section 25 of the Copyright Act empowers the District Court to award to the copyright proprietor, in lieu of actual damages and profits such damages as to the court shall appear to be just, except that such damages shall not exceed the sum of $5000 nor be less than the sum of $250, the award of $5000 is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

The decision of the Court of Appeals throws into a state of confusion the whole question of the amount of statutory damages that can be awarded in lieu of actual damages and profits, under Section 25 of the Copyright Act. The District Court is obliged in any event to award the minimum of $250, in lieu of actual damages and profits. *L. A. Westermann Co.* v. *Dispatch Printing Co.; Jewell-LaSalle Realty Co.* v. *Buck* (*supra*). But can the District Court award more than the minimum and, particularly, can it award the maximum of $5000 and can it award damages at the rate of $1 per infringing copy, when such damages to the Court appear to be just? The statute itself and the decisions of this Court and other Circuit Courts of Appeals apparently say yes, but the decision of this Circuit Court of Appeals says not.

The question as to the power of the District Court, in its discretion, to award the *maximum damages of $5000* has not yet been expressly decided by this Court. It is of the highest importance to the effective administration of the Copyright law that this question as to the extent of the discretionary power given by Congress to the District Court to award the maximum damages, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be settled. If the District Court has no discretion except to award the minimum damages of $250 in those cases in which the plaintiff is unable to prove actual damages, as the decision of the Court of Appeals implies, the Copyright law will be reduced to the state of impotence it was in prior to 1909 when, due to the lack of an effective remedy, unscrupulous persons could

appropriate literary property with impunity. This situation the present Copyright Act of 1909, and specifically Section 25, was expressly designed to prevent.

**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.**

Your Petitioners respectfully pray that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decisions of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Company*, 249 U. S. 100, and *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202.

2. Because the decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *S. E. Hendricks Co.* v. *Thomas Publishing Co.*, 242 F. 37, 41, and with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Campbell* v. *Wireback*, 269 F. 372, 375; *No-Leak-O Piston Ring Co.* v. *Norris*, 277 F. 951, 954; and *M. Witmark & Sons* v. *Pastime Amusement Co.*, 2 F.(2d) 1020, affirming the District Court, E. D. South Carolina in 298 F. 370, 480–482.

3. Because the decisions of the Circuit Court of Appeals for the First Circuit ignores the express language of Section 25 of the Copyright Act and disregards the plain intent of Congress expressed therein.

4. Because the public interest in the protection of literary property and the effective administration of the Copyright law requires that the question as to the discretion of the District Court to award the maximum statutory damages of $5000 within the expressed limits, in lieu of actual damages and profits, be settled.

5. Because it thus appears that an important question of Federal law is presented which has not been, but should be, expressly decided by this Court.

**PRAYER.**

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings of the case, numbered and entitled on its Docket No. 2903, Elisha W. Cunningham and Post Publishing Company, Defendants-Appellants *v.* William A. S. Douglas and The American Mercury, Inc., Plaintiffs-Appellees, and that the said Decree of the Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

WILLIAM A. S. DOUGLAS AND
THE AMERICAN MERCURY, INC.,
*Petitioners,*
*by* GEORGE P. DIKE.

CEDRIC W. PORTER,
*of Counsel.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No.

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

*v.*

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Petition is brought to review a decision of the Circuit Court of Appeals for the First Circuit to enjoin and recover damages for the infringement of a copyright. The decision, written by Judge Wilson (Judge Bingham dissenting) and reported at 72 F. (2d) 536 (Rec. p. 31–42) held that the award of $5000 as statutory damages and $1500 as attorney's fee was an abuse of the discretion of the District Court and reduced the award of damages to $250 and the attorney's fee to $750. The decision of Judge Lowell of the District Court was rendered orally from the bench and is unreported except in the Record herein, pages 20–21.

## JURISDICTION.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals reversing the decree of the District Court made August 9, 1934 (Rec. p. 43). The statute giving jurisdiction is Section 240a of the Judicial Code, Tit. 28 U. S. C. Section 347, as amended by the Act of February 13, 1925. Jurisdiction of copyright suits is sustained in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100.

## SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the First Circuit erred in holding that the award of $5000 statutory damages was an abuse of the discretion of the District Court.

2. The Circuit Court of Appeals for the First Circuit erred in holding that the District Court was not authorized, under Section 25 of the Copyright Act where the respondents made and sold more than 5000 infringing copies of the petitioners' short story, to award $5000 as statutory damages.

3. The said Court erred in modifying and in not affirming the decree of the District Court awarding $5000 as damages and in awarding costs to the respondents.

## ARGUMENT.

The decision of the Court of Appeals is in conflict with the statute itself and with the decisions of this Court and other Circuit Courts of Appeals, which makes it clear beyond any question that within the limits stated "the amount of damages awarded in lieu of actual damages and profits" is purely discretionary with the District Court. Within those limits, any award of damages is just and reasonable and there can be no abuse of the Court's discretion. The statute itself specifies the minimum and maximum damages which Congress regarded as just and reasonable and sets the limits of the Court's discretion. ***If the respondents believe the maximum limit of $5000 permitted by Section 25 is unreasonable, which petitioners deny, their remedy lies with Congress.*** As Mr. Justice

Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck (infra)*, pp. 207, 208:

> *"If* as applied to musical compositions, *the provisions of the entire section have proved unreasonable, the remedy lies with Congress."*

**Point 1. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE EXPRESS PROVISIONS OF SECTION 25 OF THE COPYRIGHT ACT.**

Section 25 of the Copyright Act, so far as here pertinent, is quoted on page 3–4 of the Petition.

The words of the statute are clear and express as to the damages which are recoverable. The plaintiff may recover actual damages and profits, "or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow" . . . "$1 for every infringing copy made or sold by . . . the infringer" . . . except that "such damages" shall not "exceed the sum of $5000 nor be less than the sum of $250". Being unable to prove actual damages and profits, the petitioners were left to "such damages as to the court shall appear to be just" within the limits stated. The court was empowered to award $1 for every infringing copy, under paragraph Second, up to the limit of $5000. The respondents admittedly published 384,834 copies of the infringing story, many times more than 5000. The award of the District Judge, although the maximum permitted, was obviously within the limits provided by the statute. *The statute itself specifies the minimum and maximum amounts which Congress regarded as just and reasonable and sets the limits of the court's discretion.* There being more than 5000 infringing copies, there could be no abuse of the Court's discretion in awarding statutory damages within those limits. Under these circumstances, the award of damages within those limits cannot be held so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court. There can be no doubt as to the intent of Congress to provide for the maximum, as well as the minimum, amounts which may be awarded in lieu of actual dam-

ages, and that Congress regarded the amounts specified as just and reasonable.

**Point 2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.**

In *L. A. Westermann Company* v. *Dispatch Printing Co.*, 249 U. S. 100, this Court had under consideration the meaning of Section 25, and particularly the amount of damages allowable "in lieu of actual damages and profits". The copyrights were for pictorial illustrations of styles in women's apparel.

Mr. Justice Van Devanter said (pp. 106, 107) :*

> "On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than $5000 nor less than $250,* except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less*

* (Italics ours throughout this brief.)

*than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.*

Apart from the natural import of its words, the history of the provision makes strongly for this view. . . . In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—*that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained.*"

"The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just'. *Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.*"

In *Jewell-LaSalle Co.* v. *Buck*, 283 U. S. 202, this Court again had before it the "in lieu of" clause of Section 25. There the copyright covered a musical composition and the amounts allowable as damages under paragraph 4th of Section 25(b) were in question. The following questions were certified from the Circuit Court of Appeals for the Eighth Circuit:

"Question II. 'In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called 'no other case', clause of Section 25(b) of the Copyright Act (U. S. C. Title 17, Section 25), reading, 'and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?' "

Mr. Justice Brandeis said (pp. 207, 208):

"*The definite specification of a maximum and minimum in*

*every case, is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations.* See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 109, 63 L. Ed. 499, 502, 503, 39 S. Ct. 194. *If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.* Question II. is answered in the affirmative."

Question III was as follows:

"'Is Section 25(b) Fourth of the Copyright Act (U. S. C. title 17, Section 25) applicable in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?'"

Mr. Justice Brandeis said (p. 208):

"This question has in part been necessarily answered by our discussion of question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of $250 must be made. *Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages.* See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 63 L. ed. 499, 502, 39 S. Ct. 194. Subject to this limitation, question III. is answered in the affirmative."

If more than 500 infringing performances were proved the District Court could, in its discretion, have awarded the maximum of $5000 at $10 per infringing performance. Substituting the words "$1 for each infringing copy" for the words "$10 a performance" in Mr. Justice Brandeis' statement above, the language applies directly to the present case.

**Point 3. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND AND FOURTH CIRCUITS.**

In *S. E. Hendricks Co.* v. *Thomas Pub. Co.*, 242 Fed. 37, the Court of Appeals for the Second Circuit held the award of $2500 statutory damages for 2800 infringing copies of a copyrighted book, plus a reasonable attorney's fee of $2500, to be within the discretion of the District Court. Judge Hough, after quoting the pertinent provisions of Section 25, said (p. 41):

> "As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the Mail & Express Co. Case, *supra*, we held that, in respect of an infringing publication coming under the same general category as does the present one, $250 was the minimum amount to which a plaintiff could be entitled. In *Gross* v. *Van Dyck Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, . . . but to estimate them within the sums given, without the limitations of usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' On appeal from that construction of the statute, this court approved the method pursued.
>
> *That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5000 in lieu of actual damages* has also been held in *L. A. Westermann Co.* v. *Dispatch, etc. Co.*, 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th)."

In *Campbell* v. *Wireback*, 269 Fed. 372, the Circuit Court of Appeals for the Fourth Circuit held the award of $4000 statutory damages for 4000 infringing copies of copyrighted advertising cuts not to be an abuse of the District Court's discretion. Judge Knapp said (p. 375):

> "It appears that defendants prepared a catalogue of their appliances, including the infringing cuts, and had 4,000 copies printed. Of these some 750 had been distributed at the time of the trial; the others were still in their possession. In the opinion of the court below all that is said on the question of damages is this:
>
> > 'The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies.'
>
> This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of 'such damages as to the court shall appear to be just,' as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain. The court is presumed to know the provisions of the Copyright Act, and to have exercised the discretion which that act enjoins, and the award must therefore be accepted, unless the contrary distinctly appears, as expressing its deliberate judgment of what is just under the facts and circumstances developed at the trial. ***In such a case as this, where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge.*** This is distinctly held in Westermann Co. *v.* Dispatch Co., 249 100. . . ."

See also:

*No-Leak-O Piston Ring Co.* v. *Norris*, 277 Fed. 951 at 954, where the Circuit Court of Appeals for the Fourth Circuit held the award of $3000 as statutory damages for the distribution of 15,000 copies of an infringing pamphlet, plus $750 attorney's fee, not to be an abuse of the District Court's discretion.

*M. Witmark & Sons* v. *Pastime Amusement Company*, 2 Fed. (2d) 1020, where the Circuit Court of Appeals for the Fourth Circuit upheld the award of $250 statutory damages for one performance of a musical composition as not an abuse of the District Court's discretion and affirmed the District Court, E. D. South Carolina, in 298 Fed. 470 at 480–482.

**Point 4. THE DECISION OF THE COURT OF APPEALS VIOLATES THE SETTLED RULES OF STATUTORY CONSTRUCTION LAID DOWN BY THIS COURT.**

**(a) Where a Statute Gives a Discretionary Power to an Individual to be Exercised by Him Upon His Own Opinion of Certain Facts, it is a Sound Rule of Construction that the Statute Constitutes Him the Sole and Exclusive Judge of the Existence of those Facts.**

Where Section 25 of the Copyright Act gives to the District Court the discretionary power to award such damages as *to the court* shall appear to be just within the limits of $250 and $5000, the statute clearly constitutes the District Court the sole and exclusive judge of the proper amount of damages to be awarded within these limits.

In *Martin* v. *Mott*, 12 Wheaton 19, this Court, by Mr. Justice Story, said (p. 32):

> "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence to those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power

which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself."

In *Luther* v. *Borden*, 7 Howard 1, this Court by Chief Justice Taney, after quoting the first sentence above from Martin *v.* Mott, said (p. 45):

> "The grounds upon which that opinion is maintained are set forth in the report, and that they are conclusive. The same principle applies to the case now before the court. *Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.*"

In *Philadelphia & Trenton Railroad Company* v. *Stimpson*, 14 Peters 488, Mr. Justice Story said (p. 458):

> "It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties until the contrary is proved. And where, as in the present case, an act is to be done, or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory. *No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency.*"

See also:

*Mullan* v. *United States*, 140 U. S. 240, at 245 (Mr. Justice Harlan).

*United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1 at 14 to 15 (Mr. Justice Butler).

Section 25 of the Copyright Act having empowered the District Court to award such damages as to the court shall appear to be just, within the limits of $250 and $5000, and in its discretion to

award $1 for every infringing copy made or sold by the infringer, the District Court must be presumed to have properly discharged its official duty in assessing damages, and the award of damages within those limits cannot constitute an abuse of the District Court's discretion.

**(b) The Duty of the Courts is to Enforce the Law as Written. The Courts are Not Concerned with its Wisdom or Policy. If Such Enforcement Works a Hardship in a Particular Case (which Petitioners Deny in this Case) the Responsibility for Amending the Law Lies with Congress.**

This Court has many, many times said that where the language of the statute is plain, the duty of the court is to enforce it as written. The courts are not concerned with the wisdom of the law or its policy. This is the function of the legislature.

The Court of Appeals in ignoring the plain provisions of Section 25, permitting the award of $5000 maximum damages, has in effect read out of the statute the provision as to maximum damages. In so doing, it has indulged in judicial legislation and usurped the functions of Congress. If Section 25 in this particular case is unjust and works a hardship upon the respondents, which petitioners deny, the remedy lies with Congress, not with the Court of Appeals.

In *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, this Court by Mr. Justice Day said (p. 217):

> "*Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written*, provided it be within the constitutional authority of the legislative body which passed it. Lake County *v.* Rollins, 130 U. S. 662, 670, 671; Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 33; United States *v.* Bank, 234 U. S. 245, 258; Caminetti *v.* United States, 242 U. S. 470, 485."

In *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, this Court by Mr. Justice Davis said (p. 91):

> "Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. *The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended.*"

In *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, this Court by Mr. Justice Moody said (p. 295):

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. *It is urged that this is a harsh construction.—To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional*

See also:

*New Jersey* v. *Anderson*, 203 U. S. 483, at 489, 490.
*Caminetti* v. *United States*, 242 U. S. 470, at 485.
*Whitehead* v. *Galloway*, 249 U. S. 79, 84 to 85.
*United States* v. *Goldenberg*, 168 U. S. 95, 102.
*Lake County* v. *Rollins*, 130 U .S. 662, 670, 671.
*Maxwell* v. *Moore*, 22 Howard, 185 at 191.
*Ebert* v. *Poston*, 266 U. S. 548 at 554.

**Point 5. JUDGE BINGHAM'S DISSENTING OPINION STATES THE PROPER RULE TO BE FOLLOWED HERE, AND IS IN ACCORD WITH THE STATUTE, AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.**

Judge Bingham vigorously dissented from the majority opinion of the Court.

Judge Bingham said (Rec. p. 40–41):

"As there was but a single infringement of the plaintiff's work (Westermann *v.* Dispatch Printing Co., 249 U. S. 100) the court, under the statute, was required to assess a sum not less than $250; and, *such sum being fixed by Congress in the statute, it is to be presumed to be just within the meaning of the act;* and subdivison second specifically provides that in the case of a work such as that of the plaintiffs the court may award '$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees', limited, as specified in (b) not to 'exceed the sum of $5000'. *If the sum of $250 which the statute prescribes shall be awarded for an infringement consisting of the making of a single copy, is just within the meaning of Section 25 (b) then, on proof showing the making of additional infringing copies up to 5000 or over, an award of $5000, as fixed by the statute, is likewise to be regarded as just within its meaning.* Under the statute, had the infringement consisted in the making of a single copy or of 250 copies the plaintiffs would have been entitled to only $250 as a just award. But on its appearing that the defendants made 384,834 infringing copies instead of one or 250, the question is:—Whether the District Judge can be said to have abused his discretion by following the terms of the statute and awarding a dollar a copy for at least 5000 copies of the total number of infringing copies made and sold. *To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5000, abused his discretion, would be a travesty on the law and in effect to read out of the*

*statute the provisions of Section 25(b) and subdivision second, authorizing an award of '$1 for every infringing copy made or sold' up to $5000.*

In my opinion the award of the trial court was authorized and not an abuse of discretion. *An award of damages within the statutory limits cannot be an abuse of discretion in the case of an infringement and sale of infringing copies of the nature and number here shown,* and I fail to see wherein this construction of the act, as applied to the circumstances of this case, conflicts or is not in accord with what was held in the two cases decided by the Supreme Court (Westermann *v.* Dispatch Printing Co., *supra;* Jewell-LaSalle Realty Co. *v.* Buck, 283 U. S. 202) construing this act."

The majority of the Court of Appeals may have thought that the award of $5000 damages was too high. But they cannot properly hold the award was an abuse of the District Court's discretion. In so holding they were substituting their own discretion for that of the District Court, who heard the evidence and saw the witnesses —and Congress has said that it is the discretion of the *District Court* which is controlling, within certain minimum and maximum limits—not that of the Circuit Court of Appeals. Their own idea as to damages does not justify their disregarding the statute, and ignoring the express provision for the allowance of a $5000 maximum. By their construction they have reached a remarkable and unique result—a statute which by express language *gives the District Court discretion* to award damages within certain limits is construed to mean *the exact opposite*—that the District Court *has no discretion* to award damages within those limits.

The petitioners deny absolutely that the award of $5000 damages in this case was unjust and unreasonable. The infringement was particularly flagrant and willful, without extenuating circumstances of any kind. The District Court administered the Copyright Law in accordance with its spirit and intent in a manner to protect the author in his property rights to his own literary creations against the pirating of unscrupulous individuals. The wronged and in-

nocent persons are the petitioners, not the respondents. The Court of Appeals, on the other hand, has administered and construed the Act in a manner to protect the unscrupulous infringer, in effect giving him a license to pirate any literary property at will on the payment of $250 maximum damages to the author and allowing him to lead the author on a long chase through the courts to collect that.

## CONCLUSION.

The present Copyright Law, and particularly Section 25, is the fruit of more than one hundred years experience in endeavoring to protect the author and his property in his writings. The provisions of Section 25 represent the accumulated wisdom of years in providing an effective remedy for the owner of literary property against the depredations of the literary pirate. In the twenty-five years the present Copyright Law has been in existence, it has worked remarkably well, and the keystone of the structure has been Section 25. In Section 25 Congress endeavored to give the District Court complete discretion to award, in lieu of actual damages and profits, such damages as to the Court shall appear to be just, within the limits of $250 and $5000. It is of the utmost importance to the effective administration of the Copyright Law that this discretionary power reposed by Congress in the District Court to award statutory damages, and to award the maximum damages of $5000, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be preserved. Otherwise the Copyright Law will collapse for lack of an effective remedy, and will be reduced to its state of impotence prior to 1909, when unscrupulous persons could infringe with impunity. This Court has not as yet expressly passed upon the power of the District Court to award, in its discretion, *the maximum damages of $5000.*

We respectfully submit that decision of the Circuit Court of Appeals for the First Circuit in holding the award of $5000 damages under the circumstances stated to be an abuse of the District Court's discretion, is in conflict with the plain language of Section 25 of the Copyright Act, and with the decisions of this Court, and with the decisions of other Circuit Courts of Appeal; and that the

question involved is of such public importance that this Court should authoritatively determine it.

We therefore respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that the law relating to statutory damages which may be awarded under Section 25 of the Copyright Act may be made clear; that uniformity of decision between the several circuits be established, and the Circuit Court of Appeals for the First Circuit be required to conform to the express language of the Copyright Act and to the decisions of this Court; and to that end, that a Writ of Certiorari be granted.

Respectfully submitted,

GEORGE P. DIKE,

*Attorney for Petitioners.*

CEDRIC W. PORTER,

*of Counsel.*

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CHARLES ELMORE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 519.

WILLIAM A. S. DOUGLAS and THE AMERICAN MERCURY, INC.,
Petitioners,

v.

ELIJAH WILLIAM CUNNINGHAM and POST PUBLISHING COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1934.

No. 519.

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

*v.*

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR PETITIONERS.

### I. THE OPINIONS OF THE LOWER COURTS.

The opinions of the Circuit Court of Appeals for the First Circuit in this case (Judge Bingham dissenting) are reported in *Cunningham et al.* v. *Douglas et al.*, 72 F. (2d) 536. The opinion of the District Court for the District of Massachusetts (Judge Lowell) was rendered orally from the bench and is unreported except in the record herein (R. p. 19).

### II. JURISDICTION OF THIS COURT.

The grounds for jurisdiction are as follows:

1. The date of the judgment to be reviewed is the date of the final decree of the Circuit Court of Appeals for the First Circuit, August 9, 1934 (R. p. 39) reversing the decree of the District Court.

2. This decree was rendered in a suit in equity brought under

the copyright statutes of the United States to determine the validity and infringement of a certain copyright.

3. The statute under which jurisdiction is invoked is Title 28, U. S. Code, Section 347, as amended by the Act of February 13, 1925 (Judicial Code, Section 240a).

4. Jurisdiction of this Court and of the United States courts in copyright suits is sustained in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100.

5. Certiorari was requested on the ground that the decision of the Circuit Court of Appeals was in conflict with Section 25 of the Copyright Act, the decisions of this Court and with other Circuit Courts of Appeals.

6. The Petition for Writ of Certiorari was filed in this Court on November 7, 1934 and the writ granted December 3, 1934.

## III. STATEMENT OF THE CASE.

This action was a suit in equity brought by the petitioner Douglas, in the United States District Court of Massachusetts, to enjoin and recover damages for the infringement of the copyrighted short story "Ku Klux" written by the petitioner Douglas, and published in the magazine The American Mercury for March 1928, No. 51, Volume 13. The copyright was one of many secured by the publisher, The American Mercury Inc., at one time, one blanket notice of copyright covering the entire contents of the March number and the copyright was duly registered by The American Mercury Inc. with the Register of Copyrights. Subsequently the copyright in the short story was assigned to the petitioner Douglas, who at the time of the infringement was, and now is, sole owner of the entire copyright and all rights in the short story.

The infringement charged is the publication of the same story in the Boston Sunday Post of August 30, 1931, published by respondent Post Publishing Company. The respondent Cunningham, under the name "Bill Cunningham", had rewritten the story in his own words, giving the characters different names but using the identical plot. The infringing story began on the front page of the first news section of the Sunday issue under the title "Klan Killed

Hero Of War" and was written up and published as news, although the episode and characters were entirely fictitious.

The original Bill of Complaint was brought in the name of the petitioner Douglas, as sole party plaintiff. This bill was dismissed by Lowell, D. J., on motion of defendants, on the ground that The American Mercury Inc., having secured the copyright by publication with notice of copyright and registering it, was a necessary party plaintiff. (See opinion of Lowell, D. J., R. pp. 12, 13.) An amended Bill of Complaint was thereupon filed joining The American Mercury as a party plaintiff. The case was tried thereon, November 10, 1933.

*At the trial respondents admitted both the infringement and the validity of the petitioners' copyright, and that 384,834 copies of the Sunday Post containing the infringing story were printed* (R. p. 18, fol. 20). The only question left for the District Court, therefore, was the amount of damages.

The petitioners offered evidence showing the substantial value of the story "Ku Klux" and that it had been regarded as of great value by publishers, motion picture and stage people and others qualified to judge. This evidence is discussed more in detail below (pages 6 and 7 of this brief).

The respondent Cunningham testified that he got the story from another news reporter. This testimony was entirely uncorroborated and in response to a direct question from the Court, Cunningham stated that he had not read Mr. Douglas' story in The American Mercury (R. p. 18, fol. 19; Addendum to R. p. 27).

Petitioners admitted at the trial the innocent infringement by the respondent Post Publishing Company (R. p. 17), but at no time have they conceded the innocence of the respondent Cunningham, and, in fact, flatly deny it.

Being unable to prove actual damages, the petitioners relied upon the statutory damages which might be awarded by the court in lieu of actual damages, under Section 25 of the Copyright Act (Title 17, U. S. Code, Sec. 25). On all the evidence and at the close of the case, the District Court (Lowell, J.) granted an injunction and awarded petitioners $5000 as damages, $1500 as a

reasonable attorney's fee, and costs (R. p. 19). The damages awarded were at the rate of $1 per infringing copy up to 5000 copies. The award, however, was suspended for the argument of the question of law raised by the respondents whether the Court had power to award this amount when no actual damages were proved. Briefs were submitted upon this point within one week, but in the meantime Judge Lowell had become ill and subsequently died before being able to pass upon the point in question. The case was accordingly submitted to District Judge Brewster of the District Court of Massachusetts at the point where Judge Lowell had left it and Judge Brewster handed down a decision dated December 14, 1933, finding the respondents' point of law without merit, and affirming the original award. (See R. pp. 13–15.) The final decree, therefore, was signed by Judge Brewster.

The defendants appealed, and on appeal the Circuit Court of Appeals for the First Circuit (Judge Bingham dissenting) held the award of $5000 to be so unreasonable and unjust as to amount to an abuse of the discretion given the Court under Section 25 of the Copyright Act, and reduced the award of damages to $250, the minimum permitted by the Act, and reduced the attorney's fee to $750.

The plaintiffs-appellees thereupon filed a petition for writ of certiorari in this Court November 7, 1934 and the writ was granted December 3, 1934.

## IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the First Circuit erred in holding that the award of $5000 statutory damages was an abuse of the discretion of the District Court.

2. The Circuit Court of Appeals for the First Circuit erred in holding that the District Court was not authorized, under Section 25 of the Copyright Act where the respondents made and sold more than 5000 infringing copies of the petitioners' short story, to award $5000 as statutory damages.

3. The said Court erred in modifying and in not affirming the

decree of the District Court awarding $5000 as damages and in awarding costs to the respondents.

The case therefore raises the following questions:

1. Whether the District Court is empowered by Section 25 of the Copyright Act to award, in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages, in its discretion, to allow $1 for every infringing copy made and sold by the infringer, except that such damages shall not exceed the sum of $5000, nor be less than the sum of $250.

2. Whether, under Section 25 of the Copyright Act, the allowance by the District Court of $5000 as damages in lieu of actual damages constitutes an abuse of the District Court's discretion, where the respondents made and sold more than 5000 infringing copies of the petitioners' short story.

3. Whether, where Section 25 of the Copyright Act empowers the District Court to award to the copyright proprietor, in lieu of actual damages and profits, such damages as to the court shall appear to be just, except that such damages shall not exceed the sum of $5000 nor be less than the sum of $250, the award of $5000 is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

The decision of the Circuit Court of Appeals (majority opinion) is contrary to the express language of Section 25 of the Copyright Act, to the decisions of this Court, and of the other Circuit Courts of Appeals and District Courts, and ignores the most settled principles of statutory construction, and of law. These various matters will now be considered in detail.

## V. THE EVIDENCE CLEARLY JUSTIFIES THE DAMAGES AWARDED BY THE DISTRICT JUDGE. ON THE EVIDENCE THERE WAS NO ABUSE OF THE DISTRICT COURT'S DISCRETION.

### (a) Petitioners' Evidence as to the Value of Their Copyright in the Short Story "Ku Klux".

Apart from the fact that, as a matter of law in the case of an infringement and sale of infringing copies of the nature and number here shown, there can be no abuse of discretion in awarding statutory damages within the limitations of Section 25 (discussed *infra*) —the evidence adduced by the petitioner Douglas, as to the value of his short story "Ku Klux" infringed by the respondents, clearly justified the award of maximum damages in the exercise of the District Court's discretion.

The story "Ku Klux" is a valuable piece of literary property. Mr. Douglas is a newspaper man of the highest standing and the author of a great many successful short stories published in the leading magazines. He is accustomed to creating literary property of great merit and of considerable worth. The attention of the Court is invited to Mr. Douglas' testimony as to his experience and to his highly interesting career, as reproduced in full in the Addendum to the Transcript of Record (R. pp. 21–25).

Mr. Douglas was offered publication of his story "Ku Klux" in a book of short stories published by Alfred Knopf & Co. of 750 Fifth Avenue, New York City, shortly after its publication (R. pp. 17, 23). He was offered $1,500 for the motion picture rights to the story a few months after it appeared, by Mr. Henry Aitken (R. pp. 16 and 23). (Mr. Aitken is a prominent motion picture producer.) The offer was not accepted because Mr. Halperin, the general manager of the stage magazine "Variety", told him that he could get many times that much if the story was first put on as a stage play (R. pp. 17 and 25). Mr. Al Woods, a play producer, promised Mr. Douglas that he would produce it, and on the strength of that promise, Mr. Douglas spent $450 having the story adapted for presentation upon the stage (R. pp. 17 and 23). The

play, however, was not produced on the stage. As Mr. Douglas said:

> "It would have been put on the stage but for the depression. Mr. Woods had an option on it; Al Woods held it for 6 months; then he went broke and couldn't do it. He promised that he would put it on." (R. p. 25.)

These offers from a book publisher, a motion picture producer, a play producer to publish or produce the story "Ku Klux" in book form, in the motion pictures and on the stage, show very conclusively what people competent to judge thought of Mr. Douglas' story "Ku Klux". They obviously thought it a story of great potential value. The fact that Mr. Douglas was willing to spend $450 out of his own pocket to have the story adapted for presentation upon the stage shows very clearly what Mr. Douglas thought as to its value.

*What the respondents Post Publishing Company thought of the story is clearly shown from their publishing it as a feature news article on the front page of their Sunday edition.* Giving the story such prominence obviously shows that they thought the story an excellent one and of considerable worth. *The respondent Cunningham himself paid Mr. Douglas the sincerest tribute of all to the value of the story*—by copying it, and attempting to gain the credit of being its author among the readers of the Boston Sunday Post. Even Mr. Cunningham testified as to the alleged "Martin" version of the story: ". . . on my way home I opened it and read it, and *I was very greatly impressed with the drama of it*" (R. p. 26).

On this evidence, therefore, it is obvious that the District Court could properly hold that literary property of considerable value had been flagrantly appropriated by the respondents, and in the exercise of the discretion permitted by the Copyright Act, that respondents must respond in damages in the amount of $5000. As the District Court (Lowell, J.) said (R. p. 19): "It is perfectly clear to me that the infringement was more than the statutory sum of $5000."

## VI. THE RESPONDENT CUNNINGHAM'S INFRINGEMENT WAS NOT INNOCENT.

Before considering the main proposition of law here involved, and on which certiorari was granted, it is necessary to consider briefly several minor propositions which have been previously urged by respondents or regarded by the Circuit Court of Appeals (majority opinion) as having a bearing on the question of damages and the asserted abuse of the District Court's discretion.

The respondent Cunningham testified that he got the story from another news reporter named "Abie Martin" (R. pp. 18 and 26) and, in response to a direct question from the Court, said he had not read Mr. Douglas' story in the Mercury (R. pp. 18 and 27). He offered only his own statement, entirely uncorroborated, that he had gotten his story innocently from another. He did not produce "Abie Martin", take his deposition, or even show that he had tried to get in touch with him. He did not even produce "Martin's" alleged version of the story on copy paper (R. p. 26).

Respondents now insist that Cunningham's testimony must be accepted as complete proof that Cunningham's infringement was innocent. But if respondents are so anxious to have Cunningham's infringement accepted as innocent, why did they not prove it by credible testimony? The charge of plagiarism against an author is a serious one, and an author who values his literary reputation would produce all the legal evidence possible to prove his innocence and to clear his name. This the respondent Cunningham has not even attempted to do. We are now asked to "presume" as true the evidence he has failed to produce.

Whether in fact the infringement by the respondent Cunningham was innocent or not is, of course, entirely immaterial. As Judge Thomas said in *Altman* v. *New Haven Union Co.* (D. C. D. Conn.), 254 Fed. 113, at 119:

> "And as a last defense the defendant pleads, and the court finds as a fact, that its infringement was entirely innocent. Under the law, is that a defense? The law is decisive and clear on this point, and rules against the defense, for *it has*

*been repeatedly held that ignorance of a copyright, or honest intention, affords no defense to an action for infringement."*

See also—

*M. Witmark & Sons* v. *Calloway* (D. C. E. D. Tenn. N. D.), 22 F. (2d) 412 at 414.

*Hein* v. *Harris*, 183 Fed. 107 (C. C. A. 2).

Drone on Copyright, pages 403, 404.

Weil on Copyright Law, Section 1047, page 401.

The District Court, therefore, had the power to award $5000 damages at the rate of $1 per infringing copy, in its discretion, regardless of the innocence of the infringement.

**(a) The Burden of Proving Innocent Infringement by Cunningham was Upon the Respondents and was Not Sustained.**

But if the respondents wish respondent Cunningham's infringement to be accepted as innocent, the burden of proving his innocence was upon them, and the burden was not sustained. *The petitioners having proved the infringement from the obvious similarities between the petitioners' and respondents' stories,* they made out a prima facie case and a presumption of unlawful copying arose.* The infringement was, in fact, so glaring that the respondents have admitted it. If the respondents regarded it as material to establish Cunningham's innocence the burden was upon them to do so by credible testimony. As Judge Lanning said in *Encyclopedia Britannica Co.* v. *American Newspaper Ass'n.*, 130 Fed. 460, in discussing the infringement at page 464:

". . . It is sufficient to say that the proofs show such identi-

*In the Appendix to this Brief, petitioners have compared the similarities between the Douglas and Cunningham stories in parallel columns. The respondent Cunningham's first defense to the plagiarism charge was that he and Mr. Douglas were merely writing their own versions of a true story, (Answer, Para. 10. R. p. 3). He explained in correspondence to Mr. Douglas "there is certainly no copyright upon a news event provided a man uses his own words and tells the tale his own way". When he learned that the Douglas story was entirely fictitious, the first defense was dropped, and the "Abie Martin" defense was advanced.

ties and resemblances of plan and language, and such common sequences of thought, between the two articles on each of the seven subjects, that no other opinion can be entertained than that very considerable portions of the defendant's articles were taken from the complainant's articles. . . . It is true that Peale says that the articles furnished to him by these authors were printed exactly as they were written. *But he stands alone in this statement. The convincing evidence furnished by the articles themselves overcomes his naked statement. Substantial identity, or a striking resemblance between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant.* Drone on Copyright, pp. 400, 430."

Affirmed in 134 F. 831 (C. C. A. 3).

In *General Drafting Co., Inc.* v. *Andrews* (C. C. A. 2), 37 F. (2d) 54, Judge Mack said at pages 56, 57:

"But in our judgment plaintiff established a strong prima facie showing of copying by pointing out a convincing number of similarities in style, appearance, and selection of roads and towns, and a relatively great number of identical errors and peculiarities in spelling between its and defendants' maps. . . . This showing clearly threw upon defendant the burden of going forward with evidence to explain such similarities. *Encyclopaedia Britannica Co.* v. *American Newspaper Ass'n*, (C. C.) 130 F. 460.

To meet the prima facie case, defendants offered a single witness, Tudor, who had prepared the alleged infringing map, and who had been employed by plaintiff up to 1925. . . .

From the entire record, we can find no possible explanation of the mistakes common to both maps, particularly those which do not appear on defendants' alleged base maps, except direct copying."

In *Drone on Copyright*, the author states (p. 400):

"*Similarity Creates Presumption of Copying.*—Substantial identity, or a striking resemblance, between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant."

(Page 430):

"*Presumption of Copying Created by Likeness must be Overcome by Defendant.*—When the publication complained of contains resemblances striking enough to warrant the inference of piracy, it is for the defendant to show that the likeness is not the result of copying from the complainant's work."

See also—

*Clarke* v. *White*, 12 Pet. 178.
*United States* v. *Poland*, 251 U. S. 221, 227–228.
*Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403.
*Gerlach-Barklow Co.* v. *Morris & Bendien*, 23 F. (2d) 159 (C. C. A. 2).
*Dowling* v. *Jones*, 67 F. (2d) 537, at 539 (C. C. A. 2).

But the Circuit Court of Appeals (majority opinion) has gone to great lengths and ignored the most settled judicial practices in its effort to have the respondent Cunningham regarded as innocent, and to justify its own reversal of the District Court. Said Judge Wilson (R. p. 32):

"The only inference is that Martin pirated the facts from the story in the American Mercury Magazine, unless Cunningham deliberately committed perjury in court, and he, at least, is entitled to the presumption of innocence of this crime."

This burden on the respondents of going forward with evidence to show innocent infringement certainly is not met by any "presumption of innocence", and by "presuming" that Cunningham's story is truthful. Rather any presumptions drawn must be drawn against the respondents—that having all the evidence in their control whereby it could be shown that the respondent Cunningham

acted innocently, and failing to produce it, the presumption is that such evidence did not exist or was unfavorable. See:

*Mammoth Oil Co.* v. *United States*, 275 U. S. 13, at 51, 52 (Mr. Justice Butler).
*Kirby* v. *Tallmadge*, 160 U. S. 379, 383.
*Runkle* v. *Burnham*, 153 U. S. 216, 225–226.
*The Luminary*, 8 Wheat. 407.
*Graves* v. *United States*, 150 U. S. 118, 121.

Having failed to produce the evidence entirely in their possession (if any), whereby Cunningham's innocence might have been established, and failing to meet their burden of proof, respondents cannot now be heard to complain if Cunningham's testimony is not believed, in view of the strong evidence of *unlawful copying* found in the record. On all the evidence, and weighing the inherent probabilities, the District Court as trier of the facts, would have been justified in concluding that *the respondent Cunningham was not telling the truth on the witness stand*, when he said he had not read Mr. Douglas' story in The American Mercury (R. pp. 18 and 27).

**(b) The Effect to be Given the Admission as to the Innocence of the Respondent Post Publishing Company.**

Having no evidence of any guilty knowledge on the part of Post Publishing Company, petitioners conceded for the purpose of this suit that it acted innocently in the matter (R. p. 18). This concession was specifically limited to Post Publishing Company and *did not* include the respondent Cunningham.

However, the Circuit Court of Appeals in its majority opinion said (R. p. 32):

> "The admission that it was published innocently by the principal also includes in effect an admission that Cunningham the employee and agent of the Publishing Co. in gathering data for and writing special feature stories, had no knowledge that the story had been copyrighted."

This is a complete *non sequitur*. It disregards the most fundamental principles of law. The writing of the infringing story by Cunningham and its publication by Post Publishing Company was a joint tort for which they are jointly and severally liable. Both respondents joined in separate acts of infringement (*i. e.* writing and publishing) and are joint tort-feasors. *American Code Co.* v. *Bensinger*, 282 Fed. 829 at page 834 (C. C. A. 2.). As such they are jointly and severally liable *without regard to their degrees of culpability*. As this Court said (Mr. Justice Peckham) in *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534 at 551, 552:

> "The plaintiff in bringing his action saw fit to join the gas company and several of its officers as individual defendants. He could, had he so chosen, have brought his action against the company alone. . . . Those of the wrongdoers who are sued together and found guilty in an action of tort are liable for the whole injury to plaintiff, *without examining the question of the different degrees of culpability*. And if but one is sued, he is liable for all the damages inflicted by the most culpable. Cooley on Torts, 133, 135, 136; *Currier* v. *Swan*, 63 Maine, 323; *Berry* v. *Fletcher*, 1 Dill. 67; *Pardridge* v. *Brady*, 7 Ill. App. 639; *McCarthy* v. *De Armit*, 99 Penn. St. 63, 72."

See also—

> 62 Corpus Juris, Torts, Section 44, page 1131;
> Cooley on Torts (4th Ed.) Liability for Unintentional Injury, Section 84, and particularly pages 271 and 272, as to newspaper libels.

This holding by the Circuit Court of Appeals (majority opinion) also ignores the entire doctrine of *respondeat superior*. Rather is the Post Publishing Company to be held liable for the acts of its agent and employee Cunningham, and the latter's guilty knowledge imputed to it—regardless of the Post's innocence, under well established rules of agency. As Judge Hicks said in *M. Witmark & Sons* v. *Calloway* (D. C. E. D. Tenn. N. D.), 22 F. (2d) 412 at

414, in holding a theatre owner liable for the infringement of copyright on a musical composition by his pianist:

> "Neither does the fact, if it is a fact, that young Williams, the operator of the player piano, borrowed this music without the direction, knowledge, or consent of the owner or manager of the theatre affect the question. *The rule of the common law applies, to wit, that the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do, although the particular act may have been done without express authority from the master, or even against his orders. McDonald* v. *Hearst* (D. C.) 95 F. 657; *M. Witmark & Sons* v. *Pastime Amusement Co.* (D. C.) 298 F. 470."

See also—

*Christian* v. *American Druggist Syndicate*, 285 Fed. 359, 361 (C. C. A. 2).

*M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 Fed. 472 at 475 (D. C. E. D. S. C.), affirmed in 2 F. (2d) 1020.

*Philadelphia & Reading Co.* v. *Derby*, 14 How. 468, 486.

*N. J. Steamboat Co.* v. *Brockett*, 121 U. S. 637 at 645.

*Pennsylvania Co.* v. *Roy*, 102 U. S. 451 at 457.

On all the evidence therefore, and on the most fundamental principles of law the argument by the respondents that the infringement by the respondent Cunningham must be accepted as innocent is wholly without merit. On the record, as made by both petitioners and respondents, the infringement stands as particularly flagrant and wilful, and one without extenuating circumstances of any kind which would commend themselves to a court of equity. The District Court, sitting as a court of equity and in the exercise of its sound discretion, acted properly in awarding the maximum damages of $5000.

**VII. THE AMOUNT OF STATUTORY DAMAGES TO BE AWARDED UNDER SECTION 25 OF THE COPYRIGHT ACT WITHIN THE LIMITS PROVIDED THEREIN IS PURELY DISCRETIONARY. THE $5000 DAMAGES AWARDED BY THE DISTRICT COURT BEING WITHIN THOSE LIMITS, AS A MATTER OF LAW THERE COULD BE NO ABUSE OF THE DISTRICT COURT'S DISCRETION IN AWARDING THOSE DAMAGES IN THE CASE OF AN INFRINGEMENT AND SALE OF INFRINGING COPIES OF THE NATURE AND NUMBER HERE SHOWN.**

The decision of the Court of Appeals (majority opinion) conflicts (1) with the express language of the Statute itself, (2) with the decisions of this Court and of other Circuit Courts of Appeals and District Courts, and (3) with the clear meaning of the Statute as determined from its legislative history. These make it clear beyond any question that within the limits of $250 and $5000 the amount of damages awarded "in lieu of actual damages and profits" is purely discretionary with the District Court. *In the case of an infringement and sale of infringing copies of the nature and number here shown, any award of damages within those limits is just and reasonable, and as a matter of law there can be no abuse of the Court's discretion in awarding such damages.* The statute itself specifies the minimum and maximum damages which Congress regards as just and reasonable and sets the limits of the Court's discretion. *If the respondents believe the maximum limit of $5000 permitted by Section 25 is unreasonable, which petitioners deny, their remedy lies with Congress.* As Mr. Justice Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck* (*infra*), pp. 207, 208:

> "*If* as applied to musical compositions, *the provisions of the entire section have proved unreasonable, the remedy lies with Congress.*"

**1. The Statute:**

The decision of the Circuit Court of Appeals conflicts with the express language of Section 25 of the Copyright Act. Section 25 of the Copyright Act, so far as here applicable, provides as follows:

"Section 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250 and shall not be regarded as a penalty. . . .

Second. In the case of any work enumerated in Section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

The words of the statute are clear and express as to the damages which are recoverable. The plaintiff may recover actual damages and profits, "or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow" . . . "$1 for every infringing copy made or sold by . . . the infringer" . . . except that "such damages" shall not "exceed the sum of $5000 nor be less than the sum of $250". Being unable to prove actual damages and profits, the petitioners were left to "such damages as to the court shall appear to be just" within the limits stated. The court was empowered to award $1 for every infringing copy, under paragraph Second, up to the limit of $5000. The respondents admittedly published 384,834 copies of the infringing story, many times more than 5000. The award of the District Judge, although the maximum permitted, was obviously within the limits provided by the statute. *The statute itself specifies the minimum and maximum amounts which Congress regarded as just and reasonable and sets the limits of the court's discretion.* There being more than 5000 infringing copies, there could be no abuse of the Court's dis-

cretion in awarding statutory damages within those limits. Under these circumstances, the award of damages within those limits cannot be held so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court. There can be no doubt as to the intent of Congress to provide for the maximum, as well as the minimum, amounts which may be awarded in lieu of actual damages, and that Congress regarded the amounts specified as just and reasonable.

**2. The Decisions:**

The decision of the Circuit Court of Appeals conflicts with the decisions of this Court and of other Circuit Courts of Appeals, and District Courts.

*(a) The Decisions of this Court:*

In *L. A. Westermann Company* v. *Dispatch Printing Co.*, 249 U. S. 100, this Court had under consideration the meaning of Section 25, and particularly the amount of damages allowable "in lieu of actual damages and profits". The copyrights were for pictorial illustrations of styles in women's apparel.

Mr. Justice Van Devanter said (pp. 106, 107) :*

> "On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they*

*(Italics ours throughout this brief.)

*be more than $5000 nor less than $250*, except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.*

Apart from the natural import of its words, the history of the provision makes strongly for this view. . . . In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—*that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained.*"

"The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just'. *Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.*"

In *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, this Court again had before it the "in lieu of" clause of Section 25. There the copyright covered a musical composition and the amounts allowable as damages under paragraph 4th of Section 25 (b) were in question. Certain questions were certified from the Circuit Court of Appeals for the Eighth Circuit.

Question II was as follows:

"Question II. 'In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called 'no other case', clause of Section 25 (b) of the Copyright Act (U. S. C. Title 17, Section 25), reading, 'and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?' "

Mr. Justice Brandeis said (pp. 207, 208):

*"The definite specification of a maximum and minimum in every case, is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations.* See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 109, 63 L. Ed. 499, 502, 503, 39 S. Ct. 194. *If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.* Question II, is answered in the affirmative."

Question III was as follows:

" 'Is Section 25 (b) Fourth of the Copyright Act (U. S. C. title 17, Section 25) applicable in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?' "

Mr. Justice Brandeis said (p. 208):

"This question has in part been necessarily answered by our discussion of question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of $250 must be made. *Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages. See L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 63 L. ed.

100, 502, 30 S. Ct. 194. Subject to this limitation, question III is answered in the affirmative."

*If more than 300 infringing performances were proved the District Court could, in its discretion, have awarded the maximum of $3000 at $10 per infringing performance. Substituting the words "$1 for each infringing copy" for the words "$10 a performance" in Mr. Justice Brandeis' statement above, the language applies directly to the present case.*

*(b) The decisions of other Circuit Courts of Appeals and District Courts.*

The decision of the Circuit Court of Appeals conflicts with the decisions of the Circuit Courts of Appeals for the Second and Fourth Circuits and other District Courts.

In *S. K. Hendricks Co. v. Thomas Pub. Co.*, 242 Fed. 37, the Court of Appeals for the Second Circuit held the award of $2500 statutory damages for 2800 infringing copies of a copyrighted book, plus a reasonable attorney's fee of $2500, to be within the discretion of the District Court. Judge Hough, after quoting the pertinent provisions of Section 25, said (p. 41):

> "As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the *Mail & Express Co.* case, *supra*, we held that, in respect of an infringing publication coming under the same general category as does the present one, $250 was the minimum amount to which a plaintiff could be entitled. In *Gross v. Van Dyck Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, . . . but to estimate them within the sums given, without the limitations of

usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' On appeal from that construction of the statute, this court approved the method pursued.

*That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5000 in lieu of actual damages* has also been held in *L. A. Westermann Co.* v. *Dispatch, etc. Co.*, 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th)."

In *Campbell* v. *Wireback*, 269 Fed. 372, the Circuit Court of Appeals for the Fourth Circuit held the award of $4000 statutory damages for 1000 infringing copies of copyrighted advertising cuts not to be an abuse of the District Court's discretion. Judge Knapp said (p. 375):

"It appears that defendants prepared a catalogue of their appliances, including the infringing cuts, and had 4,000 copies printed. Of these some 750 had been distributed at the time of the trial; the others were still in their possession. In the opinion of the court below all that is said on the question of damages is this:

'The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies.'

This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of 'such damages as to the court shall appear to be just,' as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain. The court is presumed to know the provisions of the Copyright Act, and to have exercised the discretion which that act enjoins, and the award must therefore be accepted, unless the contrary distinctly appears, as expressing its deliberate judgment

of what is just under the facts and circumstances developed at the trial. *In such a case as this, where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge.* This is distinctly held in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100. . . ."

See also:

*No-Leak-O Piston Ring Co.* v. *Norris*, 277 Fed. 951 at 954, where the Circuit Court of Appeals for the Fourth Circuit held the award of $3000 as statutory damages for the distribution of 15,000 copies of an infringing pamphlet, plus $750 attorney's fee, not to be an abuse of the District Court's discretion.

*M. Witmark & Sons* v. *Pastime Amusement Company*, 2 Fed. (2d) 1020, where the Circuit Court of Appeals for the Fourth Circuit upheld the award of $250 statutory damages for one performance of a musical composition as not an abuse of the District Court's discretion and affirmed the District Court, E. D. South Carolina, in 298 Fed. 370 at 480-482.

*Waterson, Berlin & Snyder Co.* v. *Tollefson*, 253 Fed. 859, D. C. S. D. California, S. D.

*Sauer* v. *Detroit Times Company*, 247 Fed. 687, D. C. E. D. Michigan, S. D.

*Tiffany Productions Inc.* v. *Dewing*, 50 F. (2d) 911, D. C. D. Maryland.

**3. The Legislative History of Section 25:**

That the amount of statutory damages awarded under Section 25 of the Copyright Act in lieu of actual damages and profits, within the limit of $250 and $5000 provided therein, is purely discretionary with the District Court can further be seen from the legislative history of Section 25.

Under the old Copyright law prior to the present Act of March 4, 1909 as amended, the recovery was limited to *actual damages proved* (except under the dramatic section R. S. 4966). R. S. 4964, 4966 and 4967, so far as here pertinent, read:

"Sec. 4964. Every person who . . . shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, *and shall also forfeit and pay such damages as may be recovered in a civil action* by such proprietor in any court of competent jurisdiction." (26 Stat. at Large, 1109.)

"Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, *such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just,*"*

"Sec. 4967. Every person who shall print or publish any manuscript whatever without the consent of the author or proprietor first obtained, *shall be liable to the author or proprietor for all damages occasioned by such injury.*" (26 Stat. at Large, 1109.)

The old law was singularly ineffective in providing any substantial remedy to prevent infringement. In most cases it was impossible, as it was for the petitioners here, to prove any *actual* damages. The court was obliged to award merely nominal damages † and the plaintiff had to go to large expense in many cases for legal services. Complaints and criticisms of the ineffectiveness of the old law were many.

Samuel J. Elder, Esq., an eminent Boston copyright lawyer addressed the Maine State Bar Association at the State House at

* R. S. 4966 was construed and upheld in *Brady* v. *Daly*, 175 U. S. 148.

†The rule of the common law that actual damages must be proved, and if unable to be proved, nominal damages only could be awarded, is illustrated in:

*Coupe* v. *Royer*, 155 U. S. 565.
*Birdsall* v. *Coolidge*, 93 U. S. 64.
*Rude* v. *Westcott*, 130 U. S. 152.
*Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439.
*New York City* v. *Ransom*, 23 How. 486.

Augusta on February 11, 1903 on "Our Archaic Copyright Laws". Mr. Elder said (page 22):

> "I cannot refrain, however, from taking up as briefly as may be the various and conflicting provisions with regard to penalties. Nothing better illustrates the archaic condition of the law. . . .
>
> (Page 23): In the case of the unauthorized publication of a manuscript of any kind, the Statute Sect. 4967, merely gives the owner of the manuscript his *actual damages* for the invasion of his rights. . . .
>
> (Page 24): The provisions with reference to infringement of a copyright upon a book (Sect. 4964) are based on the idea of compensation to the owner of the copyright. It will be observed . . . that the damages to be recovered in money *are the damages actually sustained and not an arbitrary sum;* . . ."

Mr. Elder participated in drawing up the present Copyright Act, which sought to avoid the very defects he pointed out.

The Print Publishers of America addressed a memorandum to the Joint Committees on Patents which appears in the publication "Arguments Before the Committees on Patents in the Senate and House of Representatives Conjointly, On the Bills S6330 and HR19853 to Amend and Consolidate the Acts Respecting Copyrights, December 7, 8, 9, 10 and 11, 1906", which reads in part as follows (p. 106):

> "Under the present law it is notorious that there are no effective remedies for piracy in 90 per cent of the cases that arise. In our own domain recoveries are so rare that general contempt of the law exists. . . . The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed.
>
> Nor should we leave this session without suggesting a most important point. The very nature of copyright property is

such that many cases arise in which it is impossible to adequately measure the damages. . . . The difficulty of proving with definiteness actual pecuniary damages sustained has been recognized and Congress has frequently provided statutory rates of compensation. This has been approved by the Supreme Court (see *Brady* v. *Daly*, 175 U. S. 148)."

As a result of the widespread criticism, the Copyright Act and particularly the section relating to damages was revised throughout by committees of persons interested in the protection of literary property, under the direction of the Librarian of Congress. The common law rule as to the recovery of *actual* damages was retained, but, "in lieu of actual damages and profits", the Court was given the discretion to award "such damages as to the court shall appear to be just", within certain limits, and at an enumerated rate per infringing copy or performance, when a plaintiff was unable to prove *actual* damages.

Arthur Steuart, Esq., of the Baltimore Bar, Chairman of the Advisory Committee from the American Bar Association, who was a member of the Committee which drafted S. 6330, discussed the various provisions of the proposed copyright law in hearings before the Joint Committees on Patents of the Senate and House in 1906. (S. 6330, re-introduced in the Senate in 1909 as S. 9440, became with minor changes the present copyright Act of March 4, 1909). His remarks can be found in "Arguments Before the Committees on Patents . . ." (*supra*). Mr. Steuart said as to Section 23, now Sec. 25:

(Page 176): "The language of the Section, 'In lieu of actual damages and profits, such damages as to the court shall appear just,' would appear to put into the court the absolute right, where it was an equity case, to decide what should be allowed in the way of liquidated damages, subject, of course, to the limitations that it must not be less than $250 nor more than $5000; and that the amount which the court should determine should be decided by a computation of so much per copy according to the number of copies found. . . ."

(Page 177): ". . . It does seem to me very desirable that in this section in which we are trying to preserve the discretion of the court, the independent judgment of the court, we are trying to give to the court the power to assess liquidated damages, which will not be penal and will not be fixed. The court ought to have absolute discretion as to how much will be allowed as liquidated damages, in order that we may avoid all possible danger of creating a penal provision for the punishment of this kind of infringement. It seems to me that the words as they are used in the dramatic section, (R. S. 4966) 'such damages as appear to the court just' will certainly preserve the discretion of the court and give to the court the entire control over the whole question in a way that will avoid any possible danger of the act being construed to be penal."

There can be no question, therefore, as to the defects of the old copyright law and of the intent of those who drafted Section 25 of the present law, or of the intent of Congress in enacting it. The old law provided no adequate remedy, due to the difficulty of proving actual damages and in not permitting the court to award a reasonable attorney's fee. To remedy this defect the law was changed to permit the court, "in lieu of actual damages", to award "such damages as to the court shall appear just, and in assessing such damages, the court may in its discretion, allow". . . . "In case of" a book "one dollar for every infringing copy made or sold by . . . the infringer", "and such damages shall in no other case exceed the sum of $5000 nor be less than the sum of $250, and shall not be regarded as a penalty". There can be no doubt as to the meaning of that language. As Mr. Justice Van Devanter said in *Westermann Co.* v. *Dispatch Printing Company* (*supra*):

> "In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the expressed qualification that in every case the assessment must be within

the prescribed limitations, that is to say, neither more than the maximum nor less than the minimum. *Within these limitations the court's discretion and sense of justice are controlling. . . .*"

It was obviously the intent of Congress to put teeth into the copyright law and to prevent further willful and flagrant infringements with impunity by allowing absolute discretion to the court in assessing damages, within the limitations provided. There can be no question whatever as to the power of the District Court to award damages of $5,000 herein. If the respondents believe the maximum limitation in Section 25 is too high, their remedy lies with Congress. As Mr. Justice Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck* (*supra*), 207 and 208:

> "If, as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress."

And, if the appellants present the facts of this infringement before Congress as an argument for lowering the discretionary limits of Section 25, it can be said with complete confidence that the law will *not* be changed.

## VIII. THE DECISION OF THE CIRCUIT COURT OF APPEALS VIOLATES THE SETTLED RULES OF STATUTORY CONSTRUCTION LAID DOWN BY THIS COURT.

It is a settled rule of statutory construction established by this court that where a statute gives a discretionary power to an individual to be exercised by him on his own opinion of certain facts, the statute constitutes him the sole and exclusive judge of the existence of those facts. This proposition has many times been stated by this court. See:

*Martin* v. *Mott*, 12 Wheaton 19 at 32.
*Luther* v. *Borden*, 7 Howard 1, at 45.
*Philadelphia & Trenton Railroad Company* v. *Stimpson*, 14 Peters 448 at 458.

*Mullan* v. *United States*, 140 U. S. 240, at 245.
*United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, at 14 to 15.

Thus where Section 25 of the Copyright Act gives to the District Court the discretionary power to award such damages as to the court shall appear to be just within the limits of $250 and $5000, and in its discretion to award $1 for every infringing copy made or sold by the infringer, the statute clearly constitutes the District Court the sole and exclusive judge of the proper amount of damages to be awarded within these limits. The District Court must be presumed to properly discharge its official duty in assessing damages within the provisions of the statute, and an award of the damages within those limits, under the circumstances of this case cannot, as a matter of law, be held to constitute an abuse of the District Court's discretion.

**The Majority Decision of the Circuit Court of Appeals Constitutes Judicial Legislation.**

The Court of Appeals in ignoring the plain provisions of Section 25, permitting the award of $5000 maximum damages, has in effect read out of the statute the provision as to maximum damages. In so doing, it has indulged in judicial legislation and usurped the functions of Congress. If Section 25 in this particular case is unjust and works a hardship upon the respondents, which petitioners deny, the remedy lies with Congress, not with the Court of Appeals.

This Court has many, many times said that where the language of the statute is plain, the duty of the courts is to enforce it as written. The courts are not concerned with the wisdom of the law or its policy. That is the function of the legislature.

In *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, this Court by Mr. Justice Davis said (p. 91):

> "Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. *The rights of the parties rest*

*upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."*

See also:

*United States* v. *Standard Brewery, Inc.*, 251 U. S. 210 at 217 (Mr. Justice Day).

*St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281 at 295 (Mr. Justice Moody).

*New Jersey* v. *Anderson*, 203 U. S. 483 at 489, 490.

*Caminetti* v. *United States*, 242 U. S. 470 at 485.

*Whitehead* v. *Galloway*, 249 U. S. 79, 84 to 85.

*United States* v. *Goldenberg*, 168 U. S. 95, 102.

*Lake County* v. *Rollins*, 130 U. S. 662, 670, 671.

*Maxwell* v. *Moore*, 22 Howard, 185 at 191.

*Ebert* v. *Poston*, 266 U. S. 548 at 554.

Judge Bingham vigorously dissented from the majority opinion of the Circuit Court of Appeals and held that the award of $5000 damages should be affirmed. (See his dissenting opinion R. pp. 34–37.) Judge Bingham said (R. p. 37):

> "To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5000, abused his discretion, would be a travesty on the law and in effect to read out of the statute the provisions of Section 25 (b) and subdivision second, authorizing an award of '$1 for every infringing copy made or sold' up to $5000."

The majority of the Court of Appeals may have thought that the award of $5000 damages was too high. But they cannot properly hold that the District Court did not have the power to award the $5000, damages in its discretion, or that the award was an abuse of the District Court's discretion. In so holding they were

substituting their own discretion for that of the District Court, who heard the evidence and saw the witnesses—and Congress has said that it is the discretion of the District Court which is controlling, within certain minimum and maximum limits—not that of the Circuit Court of Appeals. *cf. Passavant* v. *United States*, 148 U. S. 214, at 219–220. Their own idea as to damages does not justify their disregarding the statute, and ignoring the express provision for the allowance of a $5000 maximum. ***By their construction they have reached a remarkable and unique result—A statute which by express language gives the District Court discretion to award damages within certain limits is construed to mean the exact opposite—that the District Court has no discretion to award damages within those limits.***

It is a settled rule of appellate courts that discretionary matters are not reviewable except for abuse.

> *Earnshaw* v. *United States*, 146 U. S. 60 at 68.
> *Isaacs* v. *United States*, 159 U. S. 487 at 489.
> *Silsby* v. *Foote*, 14 Howard 218 at 220.
> *Mandeville* v. *Wilson*, 5 Cranch 15.

And when Congress empowers a court to act in its discretion within certain limits, there obviously can be no abuse of discretion when the court acts within those limits. As Mr. Justice Van Devanter said in *L. A. Westermann Co. v. Dispatch Printing Company* (*supra*), "Within these limitations, the court's discretion and sense of justice are controlling, . . ."

Congress in Section 25 of the Copyright Act gave the District Court complete discretion to award "in lieu of actual damages and profits, such damages as to the court shall appear to be just" within certain limits. In such a situation the award of damages is like the verdict or findings of fact by a jury or by the court in a jury-waived case. The review of the appellate court is limited to determining whether there was any evidence tending to sustain the verdict or findings of fact. If so, the verdict or findings are conclusive. It is entirely immaterial that on the evidence the appellate court may have reached a different result.

*Dooley* v. *Pease*, 180 U. S. 126 at 131–2.
*Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184 at 193.
*Herencia* v. *Guzman*, 219 U. S. 44 at 45.
*Abrams* v. *United States*, 250 U. S. 616, at 619.
*New York etc. R. R. Co.* v. *Winter*, 143 U. S. 60, at 75.

**IX. REPLY TO ADDITIONAL ARGUMENTS OF RESPONDENTS.**

(1) In their brief opposing the petition of certiorari the respondents said (p. 1):

> "The petitioner is bound by his admissions in the District Court (1) that there were no damages shown (Rec. p. 20). It is to be noted that the petitioner did not concede merely that he had no proof of actual damage but that there was no damage at all shown—not even nominal."

If by this statement and by the word "shown" it is meant that petitioners have admitted that they *suffered* no damages whatever, the statement is not correct. The petitioners have admitted that they were unable to "show" damages, using the word in its usual sense as meaning *to prove*. The admission in question was (Rec. p. 18):

> "I do not think we show any damages, Your Honor, and we invoke the specific sections of the statute which provide for $1.00 for each infringing copy and the amount of damages to be awarded by the court."

This statement merely brought petitioners' case under the alternative provisions of section 25, where "in lieu of *actual* damages and profits" the court might award "such damages as to the court shall appear to be just". The petitioners had, of course, suffered damages from the admitted infringement, and from the admitted violation of their property rights, but were unable to prove them, as is usual in copyright cases. The District Court (Lowell, J.) found as a fact that damages had been suffered by the petitioners (Rec. p. 19, fol. 21). See also Judge Brewster's opinion (R. p. 15).

It is entirely unnecessary, of course, to prove damages, to be entitled to an award of statutory damages "in lieu of actual dam-

ages" under section 25. Congress abandoned the common law requirement as to the proof of actual damages and permitted the District Court to award "such damages as to the court shall appear to be just", "in lieu of actual damages", and where plaintiffs are unable to prove actual damages. In practically all copyright cases, the plaintiff is unable to prove actual damages. Nevertheless in such cases this Court has said the District Court *must* award the minimum of $250 and in its discretion may award more. The power to award statutory damages is worthless, if a plaintiff must still prove—actual damages.

(2) Respondents further have relied upon the case of *Turner & Dahnken* v. *Crowley*, 252 F. 749 (C. C. A. 9), as authority for the action of the Circuit Court of Appeals herein in reducing the award of damages. This case was decided before the decision of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100. In this case $7000 statutory damages were awarded by the District Court for 7000 copies of an infringing song. The Court of Appeals for the Ninth Circuit reduced the award to $560 actual damages at 8c per copy lost profit. The original award of $7000 statutory damages was, of course, improper under Section 25 and should have been limited to $5000. The case may be distinguishable because actual damages were proved. But so far as there is anything in the case contrary to the decisions of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, and *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, it has, of course, been overruled.

(3) The respondents have also intimated that the District Judge's award was influenced by a "sense of irritation" at their publishing the infringing story as news, when it was entirely fictitious (Brief before Court of Appeals, p. 5). It is submitted that on the record this innuendo is entirely unwarranted. The same District Judge (Lowell) dismissed the original bill of complaint on defendant's motion on the ground that The American Mercury Inc., was a necessary party plaintiff, when the only decision precisely in point on the question (*Witwer* v. *Harold Lloyd Corporation*, 46 F. (2d) 792 at 794, in D. C. S. D. Cal. C. D.) was contrary.

If Judge Lowell were actuated by a "sense of irritation",—on the state of the authorities he certainly need not have ruled in defendant's favor in dismissing the original bill of complaint.

(4) Respondents and the Circuit Court of Appeals (majority opinion) have advanced the argument that the proper *administration* of Section 25 requires, in all copyright cases where a plaintiff is unable to prove actual damages, that only the minimum statutory damages of $250 should be awarded. The Court of Appeals (majority opinion) has gone further in holding that Section 25 must be so *construed*, and that the award of larger damages constitutes an abuse of the District Court's discretion. The Court of Appeals (majority opinion) said (R. p. 33):

> "Where no actual damages are proven or are shown to have resulted, there has been a clearly marked tendency by the courts to limit the award in lieu of actual damages to the minimum amount. See *Insurance Press* v. *Ford Motor Co.*, 255 F. 896; *Altman* v. *New Haven Union Co.*, 254 F. 113; *Fisher, Inc.* v. *Dillingham*, 298 F. 145; *Sauer* v. *Detroit Times*, 247 F. 687; *Waterson et al*, v. *Tollefson*, 253 F. 859; *Cravens* v. *Retain Credit Men's Ass'n*, 26 F. (2d) 833."

Whether this statement is true or not, it is clear that even in such cases the District Court nevertheless has the power in its discretion to award the *maximum* of $5000 damages if such damages appear to the court to be just, as has been shown above. The amount found as damages in one case has no bearing whatever as to the amount of damages suffered in another case, unless the facts are the same. Each case stands on its own facts. *In the six cases above cited where the minimum of $250 statutory damages was awarded the facts are entirely different from the facts in the present case.* In the first three cases, the infringement was entirely innocent and was so found, in the 4th case the defendant thought it had a license and was not intentionally infringing, in the 5th there was but one infringing performance of the copyrighted of musical composition, and in the last case *less* than 250 copies of the infringing books were printed or sold. In the last two cases the Court could

not have awarded more than $250 (*Jewell-LaSalle Realty Co.* v. *Buck, supra*).

In the present case the infringement by the respondent Cunningham was not innocent, but was flagrant and wilful and in addition 384,834 copies of the infringing story were sold.

*Contrary to the view of the Circuit Court of Appeals, in cases where the facts are similar to those shown in the present case, there is "a clearly marked tendency by the courts" to award considerably more than the minimum damages, even though the plaintiff is unable to prove actual damages.* In the following cases, the infringement was intentional in each case and the amounts noted were awarded as statutory damages for the number of infringing copies indicated:

$2500 for 2800 copies of infringing books—
*Hendricks* v. *Thomas Publishing Co.*, 242 F. 37 (C.C.A. 2).

$4000 for 4000 copies of infringing advertising cuts—
*Campbell* v. *Wireback*, 269 F. 372, (C.C.A. 4).

$3000 for 15,000 distributed copies of an infringing pamphlet—
*No-Leak-O Piston Ring Co.* v. *Norris*, 277 F. 951 (C.C.A. 4).

$2000 for 5000 copies of an infringing map—
*General Drafting Co.* v. *Andrews*, 37 F. (2d) 54 (C.C.A. 2).

$1000 for an unknown number of infringing books—
*Warren* v. *White & Wyckoff Mfg. Co.*, 39 F. (2d) 922 (D.C.S.D.N.Y.).

$8000 for 8000 copies of an infringing book—
*Schellberg* v. *Empringham*, 36 F. (2d) 991 (D.C.S.D.N.Y.)*

*(In this case the award in excess of $5000 at the rate of $1 per copy was permissible because the defendants continued the infringement after actual notice of the copyright was given by plaintiff, under the exception provided in Sec. 25 in such cases).

The District Court, as trier of the facts, placed the present case in the category of the six cases last cited, and awarded the damages it believed just. Under the statute its discretion is controlling when within the limits provided.

The District Court's award of $5000 damages in the instant case was entirely just and reasonable. The infringement was particularly flagrant and wilful, without extenuating circumstances of any kind which might commend themselves to a court of equity. The District Court administered the copyright law in accordance with its spirit and intent and in a manner to protect the literary property of an author against the pirating of unscrupulous individuals. The innocent and wronged persons here are the petitioners. The wrongdoers are the respondents. They have only themselves to blame for their being required to compensate the petitioners for the wrong they have done them. Respondents are now asking this court to affirm the action of the Circuit Court of Appeals in holding in effect that the copyright Act should be administered and construed in a manner to protect the unscrupulous infringer, and in effect to give him a license to pirate any literary property at will on the payment of $250 maximum damages to the author, and to allow him to lead the author on a long chase through the courts to collect that. It is submitted that this court should protect the author instead, by reversing the Circuit Court of Appeals and affirming the award of the District Court as to damages.

**Request for Additional Attorneys' Fee.**

Under Section 40 of the copyright act this Court is empowered to award the petitioners a reasonable attorney's fee to compensate them for the expense of proceedings in this court. It is submitted that it is unjust for the respondents to cause the petitioners additional legal expenses in appealing to this Court, when the petitioners' cause of action is admittedly just and the respondents have no defense whatever.

The petitioners hereby respectfully petition this Court for an award of such additional sum as a reasonable attorney's fee as

will compensate the petitioners for the legal expenses incurred by them in the proceedings in this Court.

## CONCLUSION.

The present Copyright Law, and particularly Section 25, is the fruit of more than one hundred years' experience in endeavoring to protect the author and his property in his writings. The provisions of Section 25 represent the accumulated wisdom of years in providing an effective remedy for the owner of literary property against the depredations of the literary pirate. In the twenty-five years the present Copyright Law has been in existence it has worked remarkably well, and the keystone of the structure has been Section 25. In Section 25 Congress endeavored to give the District Court complete discretion to award, in lieu of actual damages and profits, such damages as to the Court shall appear to be just, within the limits of $250 and $5000. It is of the utmost importance to the effective administration of the Copyright Law that this discretionary power reposed by Congress in the District Court to award statutory damages, and to award the maximum damages of $5000, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be preserved. Otherwise the Copyright Law will collapse for lack of an effective remedy, and will be reduced to its state of impotence prior to 1909, when unscrupulous persons could infringe with impunity.

The power of the District Court to award the Statutory damages of $5000 in the case of an infringement and sale of infringing copies of the nature and number here shown, under Section 25 of the Copyright Act, is unquestionable. The evidence clearly justified the damages awarded and on the facts and as a matter of law, there could be no abuse of the District Court's discretion in awarding them. The District Court, sitting as a Court of Equity, and as trier of the facts, in the exercise of its sound discretion awarded the damages it believed just. The action of the District Court was clearly within the law. The action of the Circuit Court

of Appeals in reversing the District Court, on the other hand, was erroneous and clearly outside the law.

We respectfully submit that the decision of the Circuit Court of Appeals for the First Circuit in holding the award of $5000 damages under the circumstances stated to be an abuse of the District Court's discretion, is in conflict with the express language of Section 25 of the Copyright Act and with its plain meaning as determined from its legislative history, and is in conflict with the decisions of this Court and other Circuit Courts of Appeals and District Courts construing the section, and is in conflict with the settled rules of statutory construction laid down by this Court.

We therefore respectfully submit that the decree of the Circuit Court of Appeals for the First Circuit should be reversed and the decree of the District Court as to damages should be affirmed.

Respectfully submitted,

GEORGE P. DIKE,
*Attorney for Petitioners.*

CEDRIC W. PORTER,
*of Counsel.*

Boston, Massachusetts,
January 9, 1935.

## APPENDIX.

**Comparison of Similarities and Differences Between Douglas and Cunningham Stories.**

| *Douglas.* | *Cunningham.* |
|---|---|
| 1. Story told by Lizzie Gritts, keeper of Oklahoma beer joint, and by the girl—to writer. | Story told by sheriff in Oklahoma beer joint in the girl's presence—to the writer. |
| 2. Hero — Adam Kapechik — Polish. | Hero — Joe, the Polack — last name all C's, Z's and X's. |
| 3. Hero—Ran a cobbler shop —sold cigarettes—shop became a hangout for the boys. | Hero—Worked in Old Man Trafton's Square Deal Grocery and Butcher Shop as delivery boy. When shop given to Joe, he put in pool tables, cold drinks —became stag hangout. |
| 4. Hero served in war — Marines—severely wounded at Chateau Thierry, twice decorated for individual heroism. | Hero served in war—Marines—At Chateau Thierry rescued wounded Captain from No Man's Land — wounded, but charged machine gun nest with hand grenades. |
| 5. Hero quiet, unassuming, reserved, kept to himself—had no girls but was well liked. | Hero quiet, unassuming, reserved, kept to himself—had no girls but was well liked. |
| 6. Girl—blonde, pretty, came from Arkansas border—had no folks in town—worked as sales girl in notion store. Got reputation as being "easy", called "Round Heels" by the boys. | Girl named Mae, blonde, pretty, drifted into town — worked as waitress in Elite Restaurant—known as "fast" among the boys. |

| | |
|---|---|
| 7. Hero never went out with the girl "calf-eyed" about her—struck fellow who talked about her. | Joe was not like the other fellows with the girl Mae—never fresh to her—never tried to date her up. |
| 8. Girl scorned Faulkner, the Klan organizer, who tried to pick her up, ridiculed him publicly, incurred his enmity. Said: "A dirty little old man trying to chase girls young enough to be his daughter." | Mae slapped face of County Judge Eldridge, the Ku Klux K. Kleagle, when he asked her to go out with him, while serving him at restaurant—bawled him out publicly. Said: "Why, you dirty old devil — why, you've got daughters older than I am." |
| 9. Ku Klux met in Odd Fellows Hall. | Ku Klux met in Odd Fellows Hall. |
| 10. Johnny Sakheimer, out with "Round Heels" parked in car along side the road—when Klansmen surrounded them. | Mae parked in car beside road with cook at Elite Restaurant when Klansmen surrounded them. |
| 11. Boy, fighting, was strung up —whipped—left on ground. Girl fought like wildcat, handkerchief stuffed in her mouth — strung up — stripped of almost all her clothing, and whipped by Parson Doty—both left on road side. | Boy dazed from blow—whipped once or twice—fell unconscious and dumped into his flivver. Handkerchief stuffed in girl's mouth—girl kicking and fighting like tigress was stripped of almost all her clothing, whipped by Judge Eldridge—left bleeding on grass. |
| 12. Girl found on roadside by Adam while taking a walk. Carried her to Lizzie Gritts' house, where they looked after wounds, while girl told story. | Girl staggered back to town and collapsed on Joe's doorstep and Joe and Indian housekeeper looked after her wounds while girl told story. |

13. Ku Klux parade on July 4th up Main St. Adam had gotten machine gun from armory at Oklahoma City—had belonged to National Guard and mounted machine gun on top of McMaster Bldg. at corner of Sixth and Main Streets. Dressed in full uniform with his medals on. Faulkner was in reviewing stand. Adam got machine gun into action from 100 yards, got Rev. Narcissus Harper through forehead and another through stomach. Then gun jammed. Sheriff shot Adam through head.

*End.*

Ku Klux parade on July 4th up Main St. from Forest St. Joe's Bldg. at corner. Parade headed by Judge Eldridge and as it turned into Main St. from Forest, Joe got his machine gun into action — which he had obtained from armory to which he had keys—got the judge and four others when machine gun jammed. Joe found on roof dressed in overseas uniform with his medal on. One of cops let Joe have it and the cops in that country can shoot.

14. Monument (beginning of story) to Adam reciting war services—injury to mind—who gave way during patriot's parade and fired machine gun into marchers. Erected by popular subscription.

Gravestone with tablet reciting gallantry in war. Mind unbalanced which lead to his death. Tablet erected by citizens who admired him.

15. Girl showed scars to writer for $5. and again when telling story later. Looked forty instead of what she was—twenty-two.

Girl shows scars so sheriff told tale. Girl went to hospital six months and came out an old woman.

*End.*

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SUPREME COURT OF THE UNITED STATES.
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CHARLES ELMORE

OCTOBER TERM, 1934.

**No. 519.**

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

*v.*

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

## BRIEF FOR RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI.

The single question presented by this record is whether the Circuit Court of Appeals was justified in reducing the damages awarded the plaintiff by the District Court from $5,000 to $250.

The petitioner is bound by his admissions in the District Court (1) that there were no damages shown (Rec. p. 20) and (2) that the infringement was innocent (Rec. p. 18).

It is to be noted that the petitioner did not concede merely that he had no proof of actual damage, but that there was no damage at all shown—not even nominal.

The District Court (Lowell, J.), having stated that on the face of the bill the plaintiffs could not "possibly show any damage" (Rec. p. 17), at the close of the evidence made the statement that appears on page 21 of the record and directed the clerk to make an entry of $5,000 damage "to be suspended on the question of law to be argued later" (Rec. p. 20). The judge died before such argument could be made. The case then was submitted on the record to Judge Brewster. It appears from his "memorandum" (Rec. p. 15):

> "Clearly, I cannot pass judgment upon the justice of an award by another judge of this Court" and "any party aggrieved by Judge Lowell's action has his remedy by appeal."

It is evident, therefore, that there never has been in the District Court an exercise of considered discretion.

However that may be, the question presented to the Court of Appeals was whether on the record in the case the award was "just" or, to use the language of this Court, met the "sense of justice" of the judge; 249 U. S. at p. 107. By the rule as laid down by this Court the award is to be based on:

> "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like."
>
> *Westermann Co.* v. *Dispatch Co.*, 249 U. S. at p. 106.

A Circuit Court of Appeals had earlier affirmed the same doctrine where it said:

> "The duty of the Court was to award damages as justified by the nature and circumstances of the case as developed upon trial. Thus while the discretion of the Court may be used to award damages where ***no proof of actual damage is offered***, yet the award should have relation to such inferences as are reasonably deductible from the whole case of infringement; and such damages are not to be awarded as based upon the idea of punishment."

*Turner, etc.*, v. *Crowley*, 252 Fed. 749 at 754, where the Court materially reduced the damages awarded in the District Court.

The plaintiff's evidence (Rec. p. 18) merely raised what one judge has termed "a trivial pother—a mere point of honor".

> *Fisher* v. *Dillingham*, 298 Fed. Rep. at page 145, per L. Hand, J.,

or a "tempest in a teapot".

*Warren* v. *White & Wycoff Mfg. Co.*, 39 Fed. Rep. (2d) 922, or a "very trifling advantage" to the defendant.

*Insurance Press* v. *Ford Motor Car Co.*, 255 Fed. Rep. 896, per A. N. Hand, J.

Previous to the decisions of this Court relative to the minimum to be awarded, various District Judges had rebelled against awarding the minimum damages where slight damage had been suffered.

*Woodman-Lydiard* v. *Peterson Co.*, 192 Fed. Rep. 67.
*Mills* v. *Standard Music Co.*, 223 Fed. Rep. 849.
*Decker* v. *Etchison Hat Co.*, 225 Fed. Rep. 135.

Should the case eventually come before this Court for decision, the question whether the award in the decree was "just" is necessarily involved.

A word as to the previous decisions of this Court.

In the Westermann case the record showed that the plaintiff *had* suffered real damage (249 U. S. p. 103) and so is differentiated from the present case.

In the Jewell-LaSalle case the opinion does not show whether there was damage or not, as the questions certified by the Circuit Court of Appeals merely stated that there was "no *proof* of actual damage"; quite a different thing from presenting the circumstances of the case to the Court for its opinion.

In the certificate by the Appellate Court, however, it appears that the

> "renditions and performances were public and were made available to the public and were for the purposes of profit both for said defendants and for others using the station"

and "There was no *proof* of actual damage". See certificate of the Appellate Court, pages 4, 6 and 8 in the printed record.

The argument of the petitioner that the finding of the Court is conclusive evidence that it regarded the finding as "just", inasmuch as the allowance of a dollar a copy is contained in subsection b second of Section 25, is answered by the argument of Wilson, J. (Rec. pp. 36, 37) better than it can be restated by counsel.

We submit that the application for the writ should be denied

Respectfully submitted,

EDMUND A. WHITMAN,
*of Counsel for Respondents.*

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 519.

WILLIAM A. S. DOUGLAS and THE AMERICAN MERCURY, INC.,
Petitioners,

v.

ELIJAH WILLIAM CUNNINGHAM and POST PUBLISHING COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR RESPONDENTS.

EDMUND A. WHITMAN,
*for Repondents.*

L. H. LANE, Law Printer, 221 High Street, Boston.

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# SUPREME COURT OF THE UNITED STATES.

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ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF FOR RESPONDENTS.

### STATEMENT OF THE CASE.

This is a suit under the Copyright Act and involves only an interpretation of Section 25 thereof relating to the assessment of damages where no damage appeared. The bill recites that the appellant Douglas wrote a story entitled "Ku Klux" and sold it to the American Mercury which published it in its issue for March, 1928, and duly entered the magazine in the copyright office in Washington, and at once made an assignment of the copyright on the story to Douglas.

Douglas filed this bill August 2, 1932, alleging that the respondents had infringed his copyright by its publication on August 30, 1931—a year before.

In paragraph 9 of the bill (Rec. p. 8) Douglas sets out the damages claimed as follows:

(1) He had caused his story to be adapted for the stage.

(2) He had been offered large sums for the motion picture rights.

(3) He had been offered publication of his story in a book of short stories when he had written others.

In paragraph 9 of the answers the respondents moved that the bill be dismissed as to this paragraph in the bill. See also paragraph 11. This motion was coupled with a motion to dismiss the bill on the ground that the plaintiff had no standing in Court (April 4, 1933, Rec. p. 3). This latter motion was granted after hearing (Rec. pp. 12–13) and Douglas filed an amended bill joining the American Mercury as a party plaintiff (Rec. p. 5).

The case came on to be heard in the District Court and the respondents renewed their motion to dismiss the bill as to paragraphs 9 and 11 whereupon the Court said:

> "Well, I will leave it in, Mr. Whitman, but I do not think you can possibly show any damage under it. Your motion is denied."

The defendants admitted the validity of the copyright and its infringement and the plaintiffs presented their evidence.

The plaintiff Douglas' testimony as to the damages claimed by him followed closely the allegations in the bill, adding that

> "a few months after the story had appeared (March, 1928) he had been offered $1,500 for the motion picture rights, which offer was not accepted and that he had paid $450 to the person who adapted the play for the stage in November or December of the same year" (Rec. pp. 16–17 and 23).

There was no other evidence as to damages—none even suggested after December, 1928.

> "In response to a question by the court counsel for the plaintiff admitted that the defendant corporation had acted innocently" (Rec. p. 17).

It was agreed that of the issue of the newspaper in question there were 384,831 copies, a number substantially in excess on the two following Sundays (Rec. p. 18).

During the argument the Court inquired whether counsel for the plaintiff "claimed *there were any damages* here, that he had *shown* any damages", to which counsel replied:

> "I do not think we show any damages" (Rec. p. 18).

At the conclusion of the arguments the Court inquired of counsel for the respondents:

> "You wish to suspend on the question of law?
> Mr. WHITMAN. I would, your Honor",

whereupon the Court said:

> "Mr. Clerk, you may make the entry, '$5,000 plus $1,500 attorney's fee, to be suspended on the question of law to be argued later by the parties'.
>
> Here your Post puts in as a matter of news something which it ought to know was not news, puts it on the front page of a paper which has 300,000 subscribers or buyers, and the plaintiff has shown that he refused $1,500. It is perfectly clear to me that the infringement was more than the statutory sum of $5,000. Therefore, I order the $5,000 and a $1,500 attorney's fee, plus costs, subject to the argument whether as a matter of law I have the right to award that full amount, or whether it must be shaded down or entirely cut down or entirely refused" (Rec. p. 19).

It is obvious from an inspection of the exhibit printed by the petitioner (Rec. p. 46) that the infringing story does not purport to be news, that only a small portion was on the front page and the circulation on subsequent Sundays indicates that this story did not benefit the Post by any increase of circulation. The Post's publication could inflict no possible injury on the motion picture or dramatic rights. No other short stories have been written for the proposed book. Douglas is, in effect, seeking damages for injured feelings.

After the death of Judge Lowell, who heard the evidence, the case was submitted to Judge Brewster on the record and the brief

filed by counsel for the respondent. His memorandum ordering a decree in accordance with the oral statement of Judge Lowell is found on page 13 of the record. The essential feature of this memorandum is the statement by the Judge:

> "Clearly I cannot pass judgment upon the justice of an award made by another judge of this Court. Any party aggrieved by Judge Lowell's action has his remedy by appeal" (Rec. p. 14).

Whereupon the respondents appealed to the Circuit Court of Appeals and, from its decree reversing the decree of the District Court (Rec. p. 39), the case is now before this Court.

## CONTENTIONS OF THE PARTIES.

The respondents contend

(1) That there never was a considered exercise of discretion by Judge Lowell. This order was "suspended" and he left it open as to his award "whether it must be shaded down or entirely cut down or entirely refused" (Rec. p. 19). It is not at all clear what the Judge had in mind by his phrase "entirely cut down", except as it shows the lack of familiarity with the interpretation of § 25 by the Court.

(2) Such discretion as was shown is clearly an abuse of the *sound* discretion to be exercised by the Court.

The appellants apparently base their contention on the minority opinion of Judge Bingham in the Circuit Court of Appeals, to wit:—

> "If the sum of $250, which the statute prescribes shall be awarded for an infringement consisting of the making of a single copy, is just within the meaning of Section 25 (b), then, on proof showing the making of additional infringing copies up to 5,000 or more, an award of $5,000, as fixed by the statute, is *likewise to be regarded as just* within its meaning."

In other words, that within the statutory limits the discretion of the judge as to what is *just* is absolute and not subject to review.

## ARGUMENT.

### HISTORY OF SECTION 25.

Prior to the revision of the copyright law in 1909 there had been three distinct forms of remedy to the proprietor of a copyright for infringement of different classes of works of an author. The infringer:—

(1) In case of a book, to "*pay such damages* as may be recovered in a civil action". (Rev. Stats. § 4964.)

(2) In case of map, musical composition, print, etc. "to *forfeit* one dollar for every sheet of the same found in his possession, and in case of a painting etc. ten dollars for every copy; *one half to the proprietor and the other half to the use of the United States*". (Rev. Stats. § 4965.)

(3) In case of public performance of a dramatic composition "damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, *as to the Court shall appear just*". (Rev. Stats. § 4966.)

These three classes originated at different times. As to No. 1, see Act of July 8, 1810. As to No. 2, Act of April 29, 1802. As to No. 3, Act of August 18, 1856.

Congress was a long time getting away from the penalty idea. The earliest copyright act in England (8 Anne c. 19) provided a penalty only and it was not until 1842 (5 & 6 Vict. c. 45) that penalties in England were finally abolished.

Owing to the activities of Noah Webster the colonies passed copyright acts. Maryland, North and South Carolina, Massachusetts, New Hampshire and Rhode Island, Connecticut, New Jersey, Pennsylvania, Georgia, New York and Virginia imposed forfeitures in one form or another.

The first act of Congress (May 31, 1790) for maps, charts and books imposed a forfeiture of fifty cents a sheet, one-half to the proprietor and one-half to the United States. In 1802 (Act of

April 29) the penalty was increased to a dollar a copy, as applied to prints, engravings, etc.

It was not until 1856 (Act of August 18) that protection was extended to dramatic compositions and here for the first time appeared the provision for such recovery as *shall appear to be just* with a maximum and minimum.

In the Act of 1870 (July 8) to revise the copyright law, Section 99 modified the provision as to books by giving such damages as may be recovered in a civil action, thus abandoning in the case of books the penalty idea, but in section 100 and 101 provisions as to all other compositions were retained and all three were continued without change in the Revised Statutes (1873, Dec. 1) as amended by the Act of March 3, 1891.

All the acts above referred to may be conveniently found together in Copyright Bulletin No. 3.

It is not surprising that this condition of the law was unsatisfactory both to authors and publishers and, as appears from the reports of the House and Senate committees and the extensive hearings prior to the same, all of which are referred to in the footnotes to the Jewell-La Salle case, much time and study was expended by many persons and organizations in drafting a revision of the law which would protect all. They felt that so far as the existing act had been subject to interpretation by this Court, it would be unwise to make substantial changes in phraseology that had been passed on. They noted the strict construction of the penalty clauses in *Bolles* v. *Outing Company*, 175 U. S. 262, and the liberal construction of the dramatic section in *Brady* v. *Daly*, 175 U. S. 148, and the problem was how to compensate properly an injured author without creating a forfeiture difficult of enforcement, for it was evident that, if the legislature imposed a penalty, no language of the act could prevent the Court from treating it as such.

This section (25) received full consideration by the committees of the Senate and House sitting jointly. Mr. Ansley Wilcox proposed a modification of the language so as to read:

"On in lieu of such damages and profits the plaintiff may elect to claim and thereupon to recover *as liquidated damages and not as a penalty* an amount to be assessed as hereinafter stated, etc."

Mr. Wilcox expressed at some length his inability to understand the section as drafted; Copyright Hearings December 7–11, 1906, pp. 144, 145.

Later in the hearings the committee listened to Mr. Arthur Steuart, an experienced copyright lawyer, doubtless well known to this Court, who was present in behalf of the American Bar Association and for whose opinion the House chairman expressed "great respect". (1908, p. 359.) His remarks are so illuminating that we quote them somewhat *in extenso*. He said, p. 174 of the hearings:

"We come now to the very important provision, section 23, which relates to remedies. This clause is one of very great difficulty. It relates to the civil remedies only. When this clause was first considered we were confronted with precedents of the patent law and the trade-mark law and the copyright law with reference to drama and music, and an attempt was made to put into this clause all of the remedies of the existing law and all of the remedies which have already been enacted by Congress with reference to patents, as well as trade-marks."

". . . I have not the text of Mr. Wilcox's suggestion before me, but as I remember hearing it, it appears to me to be admirably phrased to accomplish exactly the same result which is intended by the language which is used in the bill as it is presented. The language which is here used is not altogether the best which might be chosen, but it has been chosen for the reason that it repeats the language of the existing copyright act, and it was thought better to adhere to that language which has been construed by the Supreme Court and given a meaning which is a meaning we desire to follow in this act, than to change it even in the hope of making it clearer. The language of the section, 'In lieu of actual damages and profits, such damages as to the court shall appear just', would appear

to put into the court the absolute right where it was an equity case, to decide what should be allowed in the way of liquidated damages, subject of course to the limitations that it must not be less than $250 nor more than $5,000; and that the amount which the court should determine should be decided by a computation of so much per copy according to the number of copies found. Section 4966. Revised Statutes, the dramatic act, provides:

Such damages in all cases to be assessed at such sum, not less than $100 for the first, and $50 for every subsequent performance, as to the court shall appear to be just.

Now, the danger in drawing a clause of this kind is that it may be construed to be penal in its character, and therefore an interpretation may be applied to it which will be exceedingly strict and rigid, and which will be objectionable for the purpose for which we desire it. We want to make it so that it will not be penal, so that it will only be liquidated damages, so that we can recover on the evidence what the court may decide to be proper, and this langauge, 'as to the court shall appear to be just', coupled with a certain amount for each performance has been construed by the Supreme Court of the United States in the case of *Brady* v. *Daly* (175 U. S., 151), and it has been held that that language is not penal, that that is liquidated damages, and that that is a proper mode of expression to get liquidated damages into a statute. Now, in order to save ourselves from making any possible mistake in the matter, we have, at possible risk of being a little ambiguous, used the very words of the old statute as they have been construed by the Supreme Court, in order that we might be sure that under no subsequent construction would that language be held to be penal rather than liquidated damages."

". . . It does seem to me very desirable that in this section in which we are trying to preserve the discretion of the court, the independent judgment of the court, we are trying to give to the court the power to assess liquidated damages, which will not be penal and will not be fixed. The court ought to have

absolute discretion as to how much will be allowed as liquidated damages in order that we may avoid all possible danger of creating a penal provision for the punishment of this kind of infringement. It seems to me that the words as they are used in the dramatic section, 'such damages as to the court shall appear just', will certainly preserve the discretion of the court and give to the court the entire control over the whole question in a way that will avoid any possible danger of the act being construed to be penal. Whereas I think there is a possible doubt that even with the words in the section as proposed by Mr. Wilcox, that it shall not be regarded as a penalty—even with that language in the act, if the court should find, after construing it, that the act was penal, that the act did as a matter of fact provide for a penalty or as a matter of fact contain all the requirements and definitions of a penalty except in that one particular, it becomes a very serious question as to whether Congress could change a penalty into liquidated damages by merely calling it by another name."

The provision in the bill then before the committee in Section 23 (b) (1906, p. IX) for "in lieu of actual damages and profits" was "Such damages as to the Court shall appear just, *to be assessed upon the following basis*", and, after the maximum and minimum figures, the four schedules now in Section 25.

Commenting on the italicized words, Mr. Wilcox said (p. 145) :

"I do not know precisely what the gentleman who put the language in there meant by it 'to be assessed upon the following basis'. . . . Now frankly I do not know after considerable study that I have given to the bill just how that system would work out."

This criticism evidently impressed the committee as after these hearings were closed, "both the House and Senate Committee on Patents continued to consider the matter, but separately" with the result that each committee reported a bill, the two bills being substantially alike except for the clause relating to mechanical repro-

duction of music. (Report of Hearings, 1908, p. 313.) Later two other bills were presented.

The clause now under consideration received "a long series of discussions", principally on the amount of the minimum figure (1908, p. 20, statement of George Haven Putnam) with the result of a unanimous agreement on a redraft of the words criticised by Mr. Wilcox so as to read "and in assessing such damages the Court may in its discretion allow the amounts hereinafter stated" which with the addition of the word "as" before "hereinafter" is the wording of Section 25 as enacted. (1908, pp. 89–90, § 27.)

The bills as finally agreed upon were rushed through on the last day of the session with no debate other than a vigorous protest against unseemly haste. (Cong. Record, Vol. 43, Pt. 1, pp. 3747 and 3765.)

### INTERPRETATIONS BY THE COURTS.

We now come to the interpretation and administration of this section (25) by the Courts.

We need hardly refer this Court to its language in *Westermann Co.* v. *Dispatch Co.*, 249 U. S. at p. 106:

> "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like",

and the statement in *Jewell-La Salle Co.* v. *Buck*, 283 U. S. at p. 207, that

> "the amounts in the scheduled subdivisions appear to have been inserted merely as an aid to the court in awarding such damages as 'shall appear to be just'. The definite specification of a maximum and minimum in every case is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations,". . . and where "there is no showing as to actual loss, the Court must allow the statutory minimum, and may, in its *sound* discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages."

In applying the language of the opinions in these two cases it is to be noted that in the Westermann case the record showed that the plaintiff had suffered real damage (249 U. S. p. 103) and while in the Jewell-LaSalle Co. case the opinion does not show whether there was damage or not, the questions certified by the Circuit Court of Appeals merely stated that there was "no proof of actual damage"; which was quite a different thing from presenting the circumstances of the case to the Court for its opinion.

In the certificate by the Appellate Court, however, it appears that the

> "renditions and performances were public and were made available to the public and were for the purposes of profit both for said defendants and for others using the station"

but "There was no *proof* of actual damage". See certificate of the Appellate Court, pages 4, 6 and 8 in the printed record.

In the Westermann opinion no stress is laid on the four schedules in § 25 and there is no reference to the fact that the respondents' paper had a circulation of 30,000 copies.

### THE CIRCUIT COURTS OF APPEAL.

The various Circuit Courts of Appeals have had occasion to construe this section.

In *Hendricks Co.* v. *Thomas Pub. Co.*, 242 Fed. Rep. 37, the Court after remarking

> "That the language of the section (25) of the copyright act relating to the assessment of damages and profits is 'somewhat obscure' we have pointed out before" (*Mail & Express Co.* v. *Life Co.*, 192 Fed. Rep. at p. 901)

goes on to say of the words now under present consideration:

> "In *Gross* v. *Van Dyck Gravure Co.*, 230 Fed. 412, 144, C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, . . . but to estimate them within the sums given, without the limitations of usual legal proof.

The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof'. On appeal from that construction of the statute, this court approved the method pursued. . . .

"As is well known the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult if not impossible (as it often is) to prove such damages or discover profits."

"There may be circumstances under which discretion revolts from any award, by reason of the trivial nature of the thing copyrighted, or the slight success of attempted infringement; but the facts of this case present no such problem. That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word, works some considerable injury, is a matter too plain to require more than statement. That assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious. We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2) to give the new right of application to the court for such damages as shall 'appear to be just', in lieu of actual damages.

These words present no difficulty in interpretation. 'Actual' means 'real', as opposed to 'nominal'. It means 'existent', without precluding the thought of change. 'In lieu' means in place of the thing modified by the quoted phrase. (Cases cited.) Therefore what plaintiff is entitled to ask of the court in its discretion is something in the place of his real—*i. e.*, legally existent and legally ascertained—damages. If it had appeared

that, instead of distributing 2,800 copies, defendant had issued but one, the technical infringement would still have existed, and the question been presented whether plaintiff must have $250 for nothing. Such a case has never been before us, and in the present cause experience informs the court that $250 would not and could not compensate plaintiff for a damage obvious, but difficult of exact admeasurement. It covers the matter in hand to repeat what he held in the *Mail & Express Case, supra,* that, where *obvious and substantial pecuniary injury has been wrought,* $250 is the minimum award, and to approve the above-quoted language of Hand, J., that the intent of the statute (under circumstances such as the present) was to authorize the court to estimate the damages within the statutory limits, without being bound to, or by, legal proof."

In *Witmark & Sons* v. *Pastime Amusement Co.,* 298 Fed. Rep. 470, Judge Cochran in the District Court remarked:

"From a casual reading of this section, it would seem that the case of a musical composition being apparently specifically provided for in the 'fourth' paragraph, the case would be governed by that paragraph, which provides $10 for each performance, and that resort could not be had to the general clause in subdivision (b), providing $250 as the minimum, and at first I was very firmly of opinion that this was the proper construction. But a careful study of the act in the light of the decision of the Supreme Court in *Westermann Co.* v. *Dispatch Co.,* 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, convinced me that such is not the proper construction. . . .

Now, what did the court refer to when it said 'the court *may, in its discretion,* allow the amounts named in the *appended schedule*'? (Italics mine.) It is clear that by the 'appended schedule' the court meant the 'first', 'second', 'third', and 'fourth' paragraphs of section 25. When the statute is carefully studied in the light of this decision and the decision of the Circuit Court of Appeals in the same case *(233 Fed. 609,*

*147 C. C. A. 417)*, the conclusion is irresistible that the proper construction of the section is that paragraphs 'first', 'second', 'third', and 'fourth' *may be resorted to* by the court in cases to which these paragraphs respectively apply in assessing such damages as may appear just, but the court must in all cases assess such damages at not less than $250 nor more than $5,000, except where other specific provision is made in subdivision (b) itself."

The decree was affirmed on appeal on the opinion of the court below, 2 Fed. Rep. (2nd) 1020.

In *Turner & Dahnken et al.* v. *Crowley*, 252 Fed. Rep. 749 at 754, the court said:

"Appellee offered no proof of actual loss or of profits, but we gather from the testimony that at a retail price of 15 cents a copy for the song the profit to the plaintiff would not have exceeded 8 cents per copy. If, therefore, the plaintiff had received 8 cents per copy upon 7,000 copies found in the possession of Turner & Dahnken, her total damage would have been $560, which we think would be a fair estimate. Plaintiff said that she expected and authorized orchestrations of her song to be used, but did not authorize use of it as made by defendant. The allowance of $7,000, or $1 per copy of the song and music, seems to have been based upon the view that $1 per copy is a fixed sum, to be allowed under any circumstances of infringement after notice. *But, as we do not so construe the law*, the duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial. Thus, while the discretion of the court may be used to award damages, where no proof of actual damage is offered, yet *the award should have relation to such inferences as are reasonably deducible from the whole case of infringement*, and such damages are not to be awarded as based upon the idea of punishment. *13 Corpus Juris, p. 1179.*"

The Court thereupon reduced the award of the District Court of $7,000 to $560.

In *Campbell* v. *Wireback*, 269 Fed. Rep. 372 at 375, the Court of Appeals said in referring to the opinion in the court below (261 Fed. Rep. 391):

> "In the opinion of the court below all that is said on the question of damages is this:
>
> 'The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies.'
>
> This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of 'such damages as to the court shall appear to be just', as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain."
>
> Page 376: "We are unable to find any abuse of discretion in making the award under review, and this conclusion is supported by the fact that no counsel fees were allowed, as might have been done. The case is an aggravated one in many ways, and the damages inflicted by the unconscionable conduct of defendants are properly measured, as the quoted decision holds, by 'the court's conception of what is just'."

In the *Westermann* case, the Circuit Court of Appeals said (233 Fed. Rep. 609) at page 613:

> "The necessary effect of the decision is to prohibit the award of merely nominal damages. This intent implies no undue harshness. Not only does the typical copyright infringement, if not every one, involve indirect damages almost sure to be considerable, but in few cases would one sum of $250 more than compensate plaintiff for his time, trouble and expense in

detecting, following up and prosecuting an infringement. It would seem that the words 'shall not be regarded as a penalty' were added out of abundant caution, for under such a situation as usually exists on this subject the awarding of a round sum in damages is no more a penalty when damages are *liquidated by a court* than when they are liquidated by a contract."

This Court did not find it necessary to review this language.

In *No-Leak-O Piston Ring Co.* v. *Norris*, 277 Fed. Rep. 951, the Circuit Court of Appeals in review of the discretion of the Court below (271 Fed. Rep. 536) where that Court awarded $3,000 damages when it appeared that the defendant had circulated from ten to fifteen thousand copies said:

"taking all the circumstances into account (the amount awarded) seems plainly within the limits of sound discretion"

and the Court notices that a stipulation on file showed a circulation of 30,000 copies.

In *General Drafting Co.* v. *Andrews*, 37 Fed. Rep. (2nd) 54, the District Court dismissed the bill and the Court on appeal says:

"The uncontradicted evidence is that 5,000 copies of the infringing cleartype map were sold, but it does not appear and it is not alleged that the plaintiff's business was materially injured. On the entire record, we are of the opinion that an allowance of $2,000 damages will be adequate." Decree reversed.

In *Insurance Press Co.* v. *Ford*, 255 Fed. Rep. 896, where the defendant printed in a booklet of wide circulation an article written by the plaintiff, the Court of Appeals affirmed without opinion the decree of the District Court awarding the minimum penalty of $250, where Judge A. N. Hand said:

"I feel reasonably sure that the complainant has suffered a very small amount of damages, and that the defendant has secured a very trifling advantage by the publication of the article in the automobile trade."

THE DISTRICT COURTS.

The District Court judges have also expressed themselves on the interpretation of these words:

In *Waterson etc. Co.* v. *Tollefson*, 253 Fed. Rep. 859, a music case, the Judge said:

> "The provision for an allowance of 'ten dollars' must be held to apply when a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at $10, *if such method of computation under all the circumstances 'shall appear to be just'*."

In *Altman* v. *New Haven Union*, 254 Fed. Rep. 113, Judge Thomas said, where the defendant's newspaper had circulated "many thousand copies" of the infringement:

> "In deciding the amount to be awarded, the court should take into consideration all the facts and circumstances of the case. Here we have an innocent infringement, for which suit was not brought for nearly a year."
>
> "But Congress has seen fit to fix the minimum recovery at $50, below which this Court cannot assess damages, on the theory, presumably, that proof of actual damage would be difficult, if not impossible, but that always some damage would result from such an infringement."
>
> "The law of the case is with the plaintiff, the equities with the defendant, and the equities justify the court in giving every consideration possible to the defendant in deciding upon the amount the plaintiff may recover."

It is to be noted that, in the case at bar, the infringement was innocent and suit was not brought for a year.

In *Fisher* v. *Dillingham*, 298 Fed. Rep. 145, Judge L. Hand said:

> "As for damages, it seems absurd to me to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared. Except that it raises an interesting ques-

> tion of law, it would be a waste of time for every one concerned." $250 allowed and no counsel fee.

In *Sauer* v. *Detroit Times*, 247 Fed. 687, the defendant's newspaper had reproduced the plaintiff's map in two editions. The Court says:

> "I think under all the circumstances, including the fact that the defendant appears to have acted in good faith, and ceased the infringement . . . it is equitable to consider, and it should be held, that the acts of the defendant constituted an infringement for the purpose of computing damages",

and the Court, in view of the statute, awarded $250 and costs.

We have thus furnished the Court with cases showing the universal trend of judicial interpretation and application of Section 25 and we challenge the appellant to produce any case laying down the doctrine he contends for or any judicial expression other than that of Bingham, J. in this case.

The respondents concede that the trend of judicial opinion in the decided cases is to apply the minimum figure of $250 when no substantial damage is shown and that the proper inference from the Jewell-La Salle case is to apply it when no proof is offered of actual damage.

**INNOCENT INFRINGEMENT.**

The respondents also concede that innocence is no defense to infringement, but, as shown above, judges have taken it into consideration in fixing damages.

**THE COPYRIGHT PROPRIETOR ALONE IS ENTITLED TO DAMAGES.**

Section 25 awards such damages to the copyright proprietor as the copyright proprietor may have suffered due to the infringement.

The copyright proprietor in this case is the American Mercury and Douglas is a mere licensee. See opinion of Lowell, J. (Rec. pp. 12–13) and case cited.

There is nothing in the circumstances of the case to indicate that the Mercury has suffered the slightest damage. It did not insti-

tute this suit. It employed no counsel. The award herein belongs to the Mercury and the rights of Douglas, if any, to the award are, in equity, against the Mercury.

**SOUND DISCRETION.**

The respondents do not contend that, under approximate circumstances, the Court could not award the maximum of $5,000. The contention is that under the circumstances of this case, as shown in the record, the award of $5,000 was not made in the exercise of what Mr. Justice Brandeis in the Jewell-La Salle case (p. 208) terms "its *sound* discretion". It is no answer to say that within the statutory limits there can be no abuse of discretion in awarding statutory damages as the statute itself sets the limits of discretion, as contended by the petitioner in the Court of Appeals. The statute indeed sets the limits, but calls on the Court to exercise a sound discretion within those limits, and that exercise of discretion is always subject to review if it appears on the record to have been abused.

In *Langnes* v. *Green*, 282 U. S. at p. 541, the Court says:

> "The term 'discretion' denotes the absence of a hard and fast rule. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

And the Supreme Court of Massachusetts, referring to the exercise of discretion by the trial judge, says:

> "Nevertheless the decision is not absolute. It may be set aside if the Appellate Court is satisfied that justice requires a different decision."
>
> *Com.* v. *Murphy*, 282 Mass. at p. 598.

In *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, the Supreme Court set aside and revised the amount of compensation awarded to a master appointed by the trial court.

**COUNSEL FEES.**

The respondents do not understand that the question of counsel fees in the decree is open before this Court. If it is, they contend that the allowance by the Circuit Court of Appeals was excessive on the record and on the interpretation of it by that Court in the opinion limiting the fees to "preparation for the conduct of the case at the trial on the amended bill". (Rec. p. 38.)

The principle upon which counsel fees are awarded in copyright cases is well settled. The latest case is *Lewys* v. *O'Neil*, 49 Fed. Rep. (2nd) 603, where at p. 608 Judge Woolsey says:

> "In determining what is a reasonable fee to an attorney the elements to be considered, among others, are the amount involved, for that measures the attorney's responsibility; the amount of work necessary, the amount of work done, the skill used and the result."

In the *Hendricks* case, 243 Fed. Rep. 37, the Court says:

> "the court can (and always does) proceed upon its own knowledge of the value and extent of the professional services rendered."

See also *Witmark* v. *Pastime Co.*, 298 Fed. Rep. 470 at pp. 482–483.

*Leo Feist* v. *American Co.*, 253 Fed. Rep. 860.
*Witmark* v. *Calloway*, 22 Fed. Rep. (2nd) at p. 415.
*Buck* v. *Duncan*, 32 Fed. Rep. (2nd) 366.
*Buck* v. *Milam*, 32 Fed. Rep. (2nd) 622.

In *Marks* v. *Feist*, 8 Fed. Rep. (2nd) 460, the Circuit Court of Appeals said:

> "It seems to us, taking all the circumstances in this case into consideration, that the learned district judge in fixing the attorney's fee herein at $1,500 inadvertently committed an error of judgment. We think a fee in that amount was excessive and we feel constrained to reduce it."

If the question is now open, we suggest that the Circuit Court of Appeals was equally "inadvertent", particularly in view of the statement of counsel in reply to the question by the Court as to the exent of his services. (Rec. p. 19.)

**CONCLUSION.**

In conclusion, we beg to suggest that the idea of Congress as well as of the Courts is to give compensation for injury sustained. Where all the facts are before the Court adequate compensation is a matter of discretion and that discretion is always reviewable where it appears on the record that the sum awarded is not justified by any proper views of the facts. The respondents also petition the Court for a reasonable counsel fee for services before this Court.

Respectfully submitted,

EDMUND A. WHITMAN,

*for Respondents.*

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# SUPREME COURT OF THE UNITED STATES.

No. 519.—October Term, 1934.

| | |
|---|---|
| William A. S. Douglas and The American Mercury, Inc., Petitioners, *vs.* Elijah William Cunningham and Post Publishing Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit. |

[February 4, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners brought a suit in equity against the respondents in the District Court for Massachusetts, charging infringement of copyright, praying an injunction, an accounting and award of profits, and damages, or "in lieu of actual damages or profits such damages as to this court shall appear to be just and proper within the provisions of the Act of Congress in such cases made and provided." The respondents answered and the cause came on for hearing. Admissions in the pleadings, concessions by the respondents, and evidence taken, disclose the relevant facts.

Douglas wrote an original story which was accepted, copyrighted and published by The American Mercury, Inc. The rights in the story under the copyright were assigned to Douglas. Thereafter Cunningham wrote for the Post Publishing Company, and the latter published in some 384,000 copies of a Sunday edition of the Boston Post, an article which was a clear appropriation of Douglas's story. Testimony was presented with respect to the value of the story, but at the close of the trial the petitioners admitted inability to prove actual damages. The Publishing Company acted innocently in accepting the article from Cunningham, and the latter testified that he had procured the material for it from an acquaintance, believed the facts related to him were actual happenings, and was ignorant of Douglas's production. The trial judge ruled that no actual damage had been shown, but in lieu thereof granted the petitioners $5,000 and a counsel fee. Upon appeal the Circuit Court of Appeals sustained an assignment of error

which asserted the judge had abused his discretion in making the award, reversed the decree, and set the damages at $250.

The sole question presented by the petition for certiorari is whether consistently with Section 25 (b) of the Act of 1909,[1] an appellate court may review the action of a trial judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed by the section. We granted the writ of certiorari[2] because the decision of the Circuit Court of Appeals was upon an important question of federal law and probably in conflict with our decisions.[3]

The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement.

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[1]Act of March 4, 1909, c. 320, § 25, 35 Stat. 1081 as amended by Act of August 24, 1912, c. 356, 37 Stat. 489; U. S. C. Tit. 17, § 25. "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated [here follow limitations with respect to the amount of damages to be awarded for certain infringements not material in the present case] and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . ."

There follows a schedule of which item "Second" is: "In the case of any work enumerated in section 5 of this title [Sec. 5 includes periodicals and newspapers] except a painting, statue or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees."

[2] 293 U. S. —.

[3]See rule 38, par. 5 (b) (c).

This court has twice construed section 25 (b) in the light of its history and purpose. *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100; *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202. As shown by those decisions, the purpose of the act is not doubtful. The trial judge may allow such damages as he deems to be just and may, in the case of an infringement such as is here shown, in his discretion, use as the measure of damages one dollar for each copy,—Congress declaring, however, that just damages, even for the circulation of a single copy, cannot be less than $250, and no matter how many copies are made, cannot be more than $5000. In the *Westermann* and *La Salle* cases it was held that not less than $250 could be awarded for a single publication or performance. It follows that such an award, in the contemplation of the statute, is just. The question now presented is whether it can be unjust, according to the legislative standard, to use the prescribed measure,—$1 per copy,—up to the maximum permitted by the section. As the *Westermann* case shows, the law commits to the trier of facts, within the named limits, discretion to apply the measure furnished by the statute provided he awards no more than $5,000. He need not award $1 for each copy, but, if upon consideration of the circumstances he determines that he should do so, his action can not be said to be unjust. In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute. The judgment is reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

*So ordered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*